Zaharah bt A Kadir (acting as the authorised representative of Abdul Kadir bin Ami, deceased) v Ramunia Bauxite Pte Ltd & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–957 OF 2005
ZALEHA ZAHARI, ABDUL MALIK ISHAK AND ABU SAMAH JJCA
29 JULY 2011

C

Contract — Construction of terms of contract — Intention of parties — Whether there was contractual obligation for retransfer lots of land back to deceased appellant — Whether lands by implication should revert to appellant upon expiry of mining licences — Whether terms of agreement in direct conflict with recitals in preamble — Whether contemporaneous documents supported appellant's contention — Breach — Whether first respondent in breach of agreement and power of attorney

D

Land Law — Indefeasibility of title and interests — Fraud — Whether first defendant's title acquired by fraud — Whether second respondent as subsequent purchaser acquired valid and indefeasible title — National Land Code s 340

E

As between 1950 and 1952, Abdul Kadir bin Ami ('the deceased'), the original appellant, was the registered owner of eight lots of land and another 41 lots of land, and also the original holder of proprietary mining licence to mine bauxite and aluminum ores over the eight lots of land. Four promoters ('the miners'), who could not qualify for mining licences in their own names, approached the deceased and proposed the formation of a company to prospect and mine bauxite and aluminum ores under the licences granted to the deceased. Pursuant to an agreement ('the first agreement') between the deceased and the miners, the first respondent foreign company was incorporated in Singapore with the express intention to prospect and mine for bauxite and aluminum ores on the eight lots of land. Thereafter the deceased entered into another agreement with the first respondent ('the second agreement'), which allowed the latter to enter into possession of the other 41 lots of land owned by the deceased, to prospect and mine for bauxite and aluminum ores for a consideration of $18,725 to be paid to the deceased. Pursuant to the second agreement, the deceased transferred all the 41 lots of land to the first respondent and also granted the first respondent an irrevocable power of attorney ('PA') for the term of the mining licences. Sometime in 1955, the deceased was adjudicated a bankrupt and remained as such until 1983 when his bankruptcy was annulled. As a result of his bankruptcy all his assets, including the eight lots of land which were subject to the first agreement, became vested with the official assignee ('the OA'). The OA, with the approval of the court,

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A sold all the eight lots of land to the first respondent. When the deceased was discharged as a bankrupt, he made inquiries and discovered that the last mining licence issued to the first respondent expired in 1973. This prompted the deceased to demand the first respondent to retransfer to him all the 41 lots of land as agreed. When the first respondent refused to do so, but instead sold and B transferred all the 41 lots of land to its holding company ('the second respondent') the deceased filed an action against the respondent to reassert his rights over the 41 lots of land. The deceased averred that the transfer of the 41 lots of land to the first respondent was only to facilitate the first respondent's mining operations and not as a transfer of all the deceased's rights in the lands C to the first respondent. The deceased thus contended that the first respondent's transfer of the 41 lots to the second respondent was a breach of the second agreement and the PA. As the deceased passed away before he could testify, his daughter (the present appellant) was substituted as a party by way of a court order to this effect. In the course of the trial the appellant abandoned her claim D of the 41 lots and instead confined her claim to 29 lots only. In their defence the respondents denied the appellant's claims and submitted, inter alia, that the deceased had purchased the said 41 lots on behalf of the first respondent. As such, it was the first respondent's contention that it had acquired indefeasible title to the 41 lots and subsequently sold and transferred the said lots to the E second respondent for valuable consideration. The trial judge found that the three preambles in the second agreement established the fact that the deceased had purchased the 41 lots of land on behalf of the first respondent out of the first respondent's own funds, and that there was no agreement to retransfer the lands back to the deceased after the cessation of mining. As such, the High F Court dismissed the appellant's claim with costs. This was the appellant's appeal against that judgment.

Held, allowing the appeal with costs:

G (1) (per **Zaleha Zahari JCA, dissenting**) Having regard to the agreements executed and the contemporaneous documents exchanged, the trial judge had no choice but to conclude that throughout the relationship, the deceased was a self acknowledged agent of the first respondent. As for the appellant's allegation of fraud, there was no cogent evidence to support this serious allegation and to sustain an argument against the H indefeasibility of title acquired by the second respondent. Thus, based on the evidence adduced, the deceased's claim was unjustified, tainted with an absence of bona fide and unsustainable. The trial judge was therefore correct in holding that there was no basis to challenge the indefeasible title acquired by the first respondent, who in turn passed on ownership to I the second respondent (see paras 75 & 77–79).

(2) (per **Abdul Malik Ishak** and **Abu Samah JJCA**) The terms in the recital of the second agreement were also ambiguous or in direct conflict with other terms and conditions of the second agreement, namely cll 3, 4, 8,

10 and 16. However, the terms and conditions of the second agreement were clear and not inconsistent with one another. As such, the court ought to construe the second agreement according to the terms and conditions agreed upon by the parties. The expressed intention of the parties was very clear from cl 10 of the second agreement, which stated that the deceased could not sell his land during the duration of the mining licences. Further, the transfer of the lands was on the terms and conditions contained in the second agreement and not for a cash consideration. Thus, the lands by implication should revert to the appellant upon the expiry of the mining licences and the first respondent had no contractual right to hold on to the lands let alone to sell the lands to the second respondent. It would be unconscionable to allow the respondents to resile from their conscientious obligations to transfer the lands back to the deceased appellant upon completion of the mining operations (see paras 153, 184 & 247–248).

(3) (per **Abdul Malik Ishak** and **Abu Samah JJCA**) The other contemporaneous documents referred to by the respondent, ie the PA and a letter written by the deceased before the date of the second agreement supported the appellant's contention that the deceased had no intention to transfer the 29 lots he was now claiming to the first respondent permanently and unconditionally. These contemporaneous documents did not support the first respondent's contention that the deceased purchased the 29 lots for the first respondent out of various sums of money totaling $18,725 advanced by the first respondent to the deceased. Out of these 29 lots there was affirmative evidence that three lots were clearly bought by the deceased for the first respondent by way of three separate SPAs. Thus, the appellant was only entitled to claim back 26 lots of land from the first respondent (see paras 263–264 & 266).

(4) (per **Abu Samah JCA**) A perusal of the grounds of judgment of the trial judge showed that he had misdirected himself on the facts of the present case and misconstrued the true intention of the contracting parties when he relied solely on the preambles of the second agreement without scrutinising the terms and conditions of the second agreement. Clause 1 of the second agreement, which stated that the sum of $18,725 was paid by the miners to the deceased as consideration for mining on the lands and not as advances for the purchase of the lands, contradicted the second and third recitals to the preamble. As such, the second and third recitals vis-à-vis cl 1 of the agreement were clearly irreconcilable (see paras 235 & 240).

(5) (per **Abu Samah JCA**) The first respondent also had no right to sell and transfer the lands to the second respondent. The second respondent as the subsequent purchaser of the 26 lots could not acquire a valid and

indefeasible title under s 340 of the National Land Code when the first defendant's title itself was acquired by fraud (see paras 268–269).

[Bahasa Malaysia summary

Antara tahun 1950 dan 1952, Abdul Kadir bin Ami ('si mati'), perayu asal, merupakan pemilik berdaftar lapan lot tanah dan 41 lot tanah lain, dan juga pemegang asal empunya lesen perlombongan untuk melombong bauksit dan bijih aluminium atas lapan lot tanah tersebut. Empat penaja ('pelombong tersebut'), yang tidak layak mendapat lesen perlombongan atas nama mereka, telah bertemu si mati dan mencadangkan penubuhan syarikat untuk mendapat prospek dan melombong bauksit dan bijih aluminium di bawah lesen-lesen yang diberikan kepada si mati. Menurut perjanjian ('perjanjian pertama') antara si mati dan pelombong tersebut, responden pertama syarikat asing telah diperbadankan di Singapura dengan niat nyata untuk mendapat prospek dan melombong bauksit dan bijih aluminium atas lapan lot tanah tersebut. Selepas itu si mati telah memasuki satu lagi perjanjian dengan responden pertama ('perjanjian kedua'), yang membenarkan responden pertama memperoleh milikan 41 lot tanah lain yang dimiliki si mati, untuk mendapat prospek dan melombong bauksit dan bijih aluminium untuk balasan $18,725 yang perlu dibayar kepada si mati. Menurut perjanjian kedua, si mati telah memindahmilik semua 41 lot tanah kepada responden pertama dan juga memberikan responden pertama kuasa surat wakil tak batal ('SWK') bagi tempoh lesen-lesen perlombongan tersebut. Dalam tahun 1955, si mati telah dihukum bankrap dan kekal begitu sehingga tahun 1983 apabila kebankrapannya dibatalkan. Akibat daripada kebankrapannya semua asetnya, termasuk lapan lot tanah tersebut yang tertakluk kepada perjanjian pertama, telah terletakhak dengan pemegang serahhak rasmi ('PSHR'). PSHR, dengan kebenaran mahkamah, telah menjual semua lapan lot tanah tersebut kepada responden pertama. Apabila si mati dilepaskan sebagai bankrap, dia membuat siasatan dan mendapati bahawa lesen perlombongan terakhir yang dikeluarkan kepada responden pertama telah luput pada tahun 1973. Ini mendorong si mati menuntut responden pertama memindahmilik semula kepadanya semua 41 lot tanah tersebut sepertimana dipersetujui. Apabila responden pertama enggan berbuat demikian, tetapi sebaliknya menjual dan memindahmilik semua 41 lot tanah tersebut kepada syarikat induknya ('responden kedua') si mati telah memfailkan tindakan terhadap responden untuk menegaskan semula hak-haknya ke atas 41 lot tanah tersebut. Si mati menegaskan bahawa pindahmilik 41 lot tanah tersebut kepada responden pertama hanya untuk memudahkan operasi perlombongan responden pertama dan bukan sebagai pindahmilik semua hak di mati ke atas tanah-tanah tersebut kepada responden pertama. Si mati dengan itu berhujah bahawa pindahmilik responden pertama ke atas 41 lot tersebut kepada responden kedua merupakan pelanggaran perjanjian kedua dan SWK. Oleh kerana si mati telah meninggal dunia sebelum dia sempat memberi keterangan, anak perempuannya ('perayu ini') telah digantikan sebagai pihak melalui perintah mahkamah berhubung perkara

ini. Semasa perbicaraan perayu telah membiarkan tuntutannya ke atas 41 lot tersebut dan sebaliknya menghadkan tuntutannya kepada 29 lot sahaja. Dalam pembelaan mereka responden-responden telah menafikan tuntutan-tuntutan perayu dan berhujah, antara lain, bahawa si mati telah membeli 41 lot tersebut bagi pihak responden pertama. Oleh itu, adalah hujah responden pertama bahawa ia telah memperoleh hak milik tak boleh disangkal ke atas 41 lot tersebut dan berikutan itu menjual dan memindahmilik lot-lot tersebut kepada responden kedua untuk balasan bernilai. Hakim perbicaraan mendapati bahawa tiga mukadimah dalam perjanjian kedua membuktikan fakta bahawa si mati telah membeli 41 lot tanah tersebut bagi pihak responden pertama daripada wang responden pertama sendiri, dan bahawa tiada perjanjian untuk memindahmilik semula tanah-tanah tersebut balik kepada si mati selepas penghentian perlombongan itu. Oleh itu, Mahkamah Tinggi telah menolak tuntutan perayu dengan kos. Ini adalah rayuan perayu terhadap penghakiman tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **Zaleha Zahari HMR, menentang**) Setelah mengambil kira perjanjian-perjanjian yang dimasuki dan dokumen-dokumen semasa yang ditukar, hakim mahkamah tiada pilihan tetapi untuk memutuskan bahawa sepanjang hubungan itu, si mati merupakan ejen yang berpengetahuan sendiri kepada responden pertama. Berhubung dakwaan fraud perayu, tiada bukti kukuh untuk menyokong dakwaan serius ini dan untuk mengekalkan hujah terhadap hak milik tak boleh sangkal yang diperoleh oleh responden kedua. Oleh itu, berdasarkan keterangan yang dikemukakan tuntutan si mati tidak dijustifikasikan, dicemari ketiadaan niat baik dan tidak boleh kekal. Hakim perbicaraan dengan itu adalah betul dalam memutuskan bahawa tiada asas untuk mencabar hak milik tak boleh sangkal yang diperoleh oleh responden pertama, yang telah memindahmilik pemilikan kepada responden kedua (lihat perenggan 75 & 77–79).

(2) (oleh **Abdul Malik Ishak** dan **Abu Samah HHMR**) Terma dalam resital perjanjian kedua juga tidak jelas atau secara langsung berkonflik dengan terma dan syarat perjanjian kedua, iaitu fasal-fasal 3, 4, 8, 10 dan 16. Walau bagaimanapun, terma dan syarat perjanjian kedua adalah jelas dan tidak konsisten antara satu sama lain. Oleh itu mahkamah patut mentafsir perjanjian kedua menurut terma dan syarat yang dipersetujui oleh pihak-pihak. Niat nyata pihak-pihak adalah jelas berdasarkan fasal 10 perjanjian kedua, yang menyatakan bahawa si mati tidak boleh menjual tanahnya dalam tempoh lesen-lesen perlombongan tersebut. Selanjutnya, pindahmilik tanah tersebut adalah berdasarkan terma dan syarat yang terkandung dalam perjanjian kedua dan bukan untuk balasan tunai. Oleh itu, tanah-tanah tersebut secara implikasi patut dikembalikan kepada perayu setelah lesen-lesen perlombongan luput

dan responden pertama tiada hak kontraktual untuk memegang tanah-tanah tersebut apa lagi menjual tanah-tanah tersebut kepada responden kedua. Adalah tidak wajar untuk membenarkan responden-responden mengelak daripada tanggungjawab mereka memindahmilik tanah-tanah tersebut balik kepada si mati perayu setelah selesai operasi perlombongan (lihat perenggan 153, 184 & 247–248).

(3) (oleh **Abdul Malik Ishak** dan **Abu Samah HHMR**) Dokumen-dokumen lain semasa dirujuk oleh responden, iaitu SWK dan surat yang ditulis oleh si mati sebelum tarikh perjanjian kedua menyokong hujah perayu bahawa si mati tiada niat memindahmilik 29 lot yang kini dituntutnya daripada responden pertama secara kekal dan tanpa syarat. Dokumen-dokumen semasa tersebut tidak menyokong hujah responden pertama bahawa si mati telah membeli 29 lot daripada responden pertama daripada pelbagai jumlah wang sejumlah $18,725 yang didahulukan oleh responden pertama kepada si mati. Daripada 29 lot itu terdapat keterangan afirmatif bahawa tiga lot dengan nyata telah dibeli oleh si mati daripada responden pertama melalui tiga perjanjian jualbeli berasingan. Oleh itu, perayu hanya berhak menuntut balik 26 lot tanah daripada responden pertama (lihat perenggan 263–264 & 266).

(4) (oleh **Abu Samah HMR**) Penelitian alasan-alasan penghakiman hakim perbicaraan menunjukkan bahawa beliau telah salah arah atas fakta kes ini dan salah tafsir niat sebenar pihak-pihak dalam kontrak apabila beliau bergantung semata-mata atas mukadimah perjanjian kedua tanpa meneliti terma dan syarat perjanjian kedua. Fasal 1 kepada perjanjian kedua, yang menyatakan bahawa jumlah $18,725 telah dibayar oleh pelombong tersebut kepada si mati sebagai balasan untuk melombong atas tanah tersebut dan bukan sebagai pendahuluan belian tanah tersebut, bertentangan dengan resital kepada mukadimah itu. Oleh itu, resital kedua dan ketiga berbanding dengan fasal 1 perjanjian jelas tidak selari (lihat perenggan 235 & 240).

(5) (oleh **Abu Samah HMR**) Responden pertama juga tiada hak untuk menjual dan memindahmilik tanah-tanah tersebut kepada responden kedua. Responden kedua sebagai pembeli seterusnya 26 lot tersebut tidak boleh memperoleh hak milik sah dan tak boleh disangkal di bawah s 340 Kanun Tanah Negara apabila hak milik defendan pertama sendiri telah diperoleh melalui fraud (lihat perenggan 268–269).]

Notes

For cases on fraud, see 8(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3333–3334.

For cases on intention of parties, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3715–3738.

Cases referred to

A Meredith Jones & Co Ltd v Vangemar Shipping Co Ltd (The 'Apostolis') (No 2) [2000] 2 Lloyd's Rep 337, CA (refd)
Addiscombe Garden Estates, Ltd and another v Crabbe and others [1957] 3 All ER 563, CA (folld)
Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615, HC (refd)
Bahr and another v Nicolay and others (1998) 78 ALR 1 (refd)
Banner Homes Group plc v Luff Developments Ltd and another [2000] 2 All ER 117, CA (refd)
Chamber Colliery Company, Limited v Twyerould [1915] 1 Ch 268, HL (refd)
Chandris v Isbrandtsen-Moller Co Inc [1951] 1 KB 240, CA (refd)
China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)
Choo Kok Beng v Choo Kok Hoe & Ors [1984] 2 MLJ 165, PC (refd)
Earl of Jersey, The v The Guardians of the Poor of the Neath Poor Law Union acting as the Neath Union Rural Sanitary Authority (1889) 22 QBD 555, CA (refd)
Esso Petroleum Co Ltd v Southport Corporation [1956] AC 218, HL (refd)
Eves v Eves [1975] 3 All ER 768, CA (refd)
Ex Parte Dawes, In re Moon (1886) 17 QBD 275, CA (refd)
Federal Flour Mills Bhd v Fima Palmbulk Services Sdn Bhd and another appeal [2005] 6 MLJ 525, CA (refd)
Gowan v Christie (1873) LR 2 SC App 273 (refd)
Grant v Edwards and another [1986] Ch 638; [1986] 2 All ER 426, CA (refd)
Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213, CA (refd)
Holliday v Overton (1852) 14 Beav 467 (refd)
Hussey v Palmer [1972] 3 All ER 744, CA (refd)
Investors Compensation Scheme Ltd v West Bromwich Building Society, Same v Hopkin & Sons (A Firm) and others [1998] 1 WLR 896, HL (refd)
Jai Gopal Singh and others v Divisional Forest Officer AIR 1953 Patna 310 (refd)
Kerry v Carter [1969] 1 WLR 1372, CA (refd)
Loke Yew v Port Swettenham Rubber Company, Limited [1913] AC 491, PC (refd)
Lucas v Williams & Sons [1892] 2 QB 113, CA (refd)
Mackenzie and others v The Duke of Devonshire and others [1896] AC 400, HL (refd)
Malayan Banking Bhd v PK Rajamani [1994] 1 MLJ 405, SC (folld)
Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403, HL (refd)
Palmer v Guadagni [1906] 2 Ch 494 (refd)
Paragon Finance plc v DB Thakerar & Co (a firm); Paragon Finance plc and another v Thimbleby & Co (a firm) [1999] 1 All ER 400, CA (refd)
Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp [1995] 1 MLJ 401, FC (folld)

Prestcold (Central) Ltd v Minister of Labour [1969] 1 WLR 89, CA (refd)
Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh [1997] 2 MLJ 373, CA (refd)
Shaw v Hutton-Shaw [2007] 1 FLR 1839, CA (refd)
Shrewsbury v Adam [2006] 1 P & CR 27, CA (refd)
Square Mile Partnership Ltd v Fitzmaurice McCall Ltd [2007] 2 BCLC 23, CA (refd)
State of Rajasthan v Hanuman AIR 2001 SC 282 (refd)
Strand Music Hall Co (Ltd), Re (1865) 35 Beav 152 (refd)
Tan Kim Leng & Anor v Chong Boon Eng & Anor [1974] 2 MLJ 151, FC (refd)
Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] MLJ 87 (refd)
Taylor v Rive Droite Music Ltd [2006] EMLR 4, CA (refd)
Thorp v Holdsworth (1876) 3 Ch D 637 (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Virutthasalam & Ors v Phang Quee [1965] 1 MLJ 133 (refd)
Walsh v Trevanion (1850) 15 QB 733 (refd)
Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669, HL (refd)
Woo Yew Chee v Yong Yong Hoo [1979] 1 MLJ 131, FC (folld)
Yusoff bin Kassim v PP [1992] 2 MLJ 183, SC (refd)
Yaxley v Gotts and another [2000] 1 All ER 711, CA (refd)

Legislation referred to

Bankruptcy Act 1967 s 38(1)(a)
Evidence Act 1950 s 61
Johor Mining Enactment s 43
Limitation Act 1953 ss 2(2), 9(1), 24(1)
National Land Code s 340
Rules of the High Court 1980 O18 r 19, Form 14A

Appeal from: Civil Suit No MT3–22–821 of 1985 (High Court, Johor Bahru)

Yougesswary Singam (Zainal Abidin & Co) for the appellant.
Logan Sabapathy (Wong Guo Bin with him) (Logan Sabapathy & Co) for the respondents.

Zaleha Zahari JCA (dissenting):

[1] The appellant's appeal, qua representative of the plaintiff, Abdul Kadir bin Ami ('the deceased'), is against the decision of the Johor Bahru High Court dated 22 June 2005.

[2] The consideration of this appeal rests on an interpretation and the drawing of inferences of contemporaneous documents or correspondence

transacted by the deceased during his lifetime with the previous owners of the lands in issue as well as with the defendants, and sworn affidavits affirmed by the deceased in his lifetime which has been allowed to be introduced in evidence by an order of court dated 21 January 1989.

BACKGROUND

[3] The background facts of this case dates back to a relationship over 50 years ago.

[4] By agreement dated 10 November 1950 ('the 1950 agreement') between the deceased with 18 landowners named in this agreement, the deceased purchased nine lots of land (namely Lot Nos 159, 160, 280, 175, 176, 177, 178, 180 and 118) directly from them. These nine lots has been renumbered as the eight lots cited in the First Schedule to the amended writ and statement of claim. The deceased paid the purchase price for these nine lots. The deceased became the registered owner of these eight lots ('the eight lots').

[5] It is common ground that the deceased became the registered proprietor/beneficial owner of the 41 pieces of land described in the Second Schedule (the '41 pieces of land') to the amended writ and statement of claim during 1951 and 1952.

[6] On 10 March 1951 the deceased signed an agreement with the promoters of Ramunia Bauxite dated 10 March 1951 ('the 1951 agreement'). The recital to this 1951 agreement between the deceased with the four persons named therein (i) Wong Shee Fun; (ii) Tow Keng Hee; (iii) Tow Siang Ling; and (iv) Ng Yook Lin) (the promoters of the first defendant termed as 'Miners' in the agreement) states that the deceased had applied for proprietary mining licence in his own name from the Government of Johor and was issued with the said licence on 27 January 1951.

[7] In consideration of the promises contained in the 1951 agreement the miners were allowed to enter into possession of the eight lots to carry out mining operations under mining licences which the deceased had obtained. Clauses 5 and 6 of the 1951 agreement retains the deceased's right to be indemnified by the miners for breach of the miner's obligation to exercise due care and skill in carrying out the mining operations; the right of entry to inspect the eight lots; the right to inspect the books on the accounts of ore produced from the eight lots. Clause 8 states that the deposit of the titles to the eight lots with the miners are for the purpose for ensuring that during the continuance of this agreement the deceased did not encumber the said lands and the said deposit is not an outright intention to transfer the said lands to the

miners. Clause 14 states that the deposit of the titles to the miners are to facilitate the mining operations and not an outright transfer of the deceased's proprietary interest.

[8] Clauses 11 and 13 of the 1951 agreement provides as follows:

> 11 The Miners shall form a private Limited Company for the purpose of working the lands under the said Proprietary Mining licences and any future Proprietary Mining licences which may be issued to the Proprietor and the Mines shall allot and give to the Proprietor one free share out of every 100 shares issued by such Company in addition to the payment of $2-00 for every ton of bauxite and alluminium ores won from the said lands as expressed in clause 3 of this agreement.
>
> 13 It is hereby expressly agreed between the parties hereto that the terms of this Agreement shall also apply in all respect of any future renewal or renewals of the said Proprietary Mining licences and to any mining lease or leases for which the said Proprietary Mining licences may be exchanged and to any future and other applications for a Proprietary Mining licence or licence to be granted to the Proprietor in respect of any other lands in Telok Ramunia for mining bauxite and alluminium ores without any further consideration apart from the consideration herein mentioned except that all expenses and costs incurred by the Proprietor in applying for acquiring such future and other Proprietary Mining licences or licences shall be borne by the Miners.

[9] As evident from cll 11 and 13 of the 1951 agreement, the miners is required to form a private limited company to undertake mining on the eight lots as well as on other lands to which mining licences may be issued to the deceased in the future. Subject to certain obligations, the deceased were to be issued with one free share for every hundred (100) that may be issued in the private limited company and be paid $2 per ton of bauxite ore mined on the eight lots. Clause 13 reflects the intention of parties on future dealings between the deceased and the miners. The terms of the 1951 agreement shall apply in all respects to any future renewals of the proprietary mining licence and to other applications for a proprietary mining licence to be granted to the deceased in respect of any other lands. That all expenses and costs incurred by the deceased in applying for and acquiring such future proprietary mining licences shall be borne by the miners.

[10] The record also shows that the deceased had executed a power of attorney in favour of the miners on the same date of the 1951 agreement.

[11] Thereafter, pursuant to cl 11 of the 1951 agreement, in October 1951, Ramunia Bauxite Private Ltd (ie the first defendant) was incorporated in Singapore. The deceased was appointed a director of the first defendant from

inception until 1954.

THE 1952 AGREEMENT

[12] On 8 March 1952 the deceased entered into another agreement with the first defendant ('the 1952 agreement'). The terms of 1952 agreement are in pari materia with the 1951 agreement and the intention of parties as reflected at cl 13 of the 1951 agreement. In consideration of the promises contained therein with respect to the 41 pieces of land described in the Schedule to the agreement, the deceased gave the first defendant the right to enter into possession of the 41 pieces of lands as well as the right to mine bauxite in return for payment of tributes to the deceased based on the quantity of the bauxite mined.

[13] The recitals of this 1952 agreement describes the interest of the first defendant vis-a-vis the deceased (referred to as 'proprietor') in the following terms:

> WHEREAS the Proprietor is the registered proprietor, owner or occupant of the lands described in the Schedule hereto (hereinafter referred to as the 'said lands').
>
> 'AND WHEREAS the Miners have from time to time advanced various sums of money to the Proprietor amounting to Dollars Eighteen thousand seven hundred and twenty-five ($18,725.-) for the purchase of the said lands in the name of the Proprietor.
>
> AND WHEREAS the said lands have been purchased in the name of the Proprietor for and on behalf of the Miners (as the Proprietor hereby acknowledges).
>
> AND WHEREAS the said lands have been acquired for the express purpose of enabling the Miners to prospect and mine for bauxite and alluminium ores or any other mineral ores on the terms and conditions hereinafter contained'.

[14] The construction of these preambles will be dealt with later in this judgment.

THE DECEASED'S LETTER DATED 14 FEBRUARY 1952

[15] This letter dated 14 February 1952 of the deceased to the managing director of the first defendant, is significant in making a considered decision of this case. In this letter the deceased declared his position in respect of the lands referred to in the letter as follows:

> The Managing Director
>
> Ramunia Bauxite Ltd
>
> Singapore

Re: Land bought in Telok Ramunia by Messrs. Ramunia Bauxite Ltd., in the name of Abdul Kadir bin Ami for the purpose of mining Bauxite under an Agreement between Abdul Kadir bin Ami and other Directors of Ramunia Bauxite Ltd., dated 10.3.51 comprising of Lots 170, 168, 164, 128, 169, 167, 157, 161, 158, 162, 163, 144, 156, 140, 141, 148, 155, 143, 55, 150, 39, 149, 145, 154, 152, 136, 153, 139, 142, 141, 165, 135, LO. 33, 134, 138, A.0.385, 151, 172, 171, 166, 137

I, Abdul Kadir bin Ami, a Director of Ramunia Bauxite Ltd., having purchased and registered in my own name certain bauxite bearing lands situated on Bukit Bopeng and Bukit Wakab Besar in Telok Ramunia comprising of lots as mentioned above, do hereby declare that these purchases have been made on behalf of the Company with the Company's funds, and are the properties of the Company (Ramunia Bauxite Ltd.).

I further accept the fact that these lands have been acquired for the express purpose of bauxite mining under the terms of an Agreement made between me and my fellow Directors, Messrs. Tow Keng Hee, Wong Shee Fun, Tow Siang Ling and Ng Yook Lin, dated 10.3.51, whereby it is clearly stated that I shall be entitled a tribute of $2.00 per ton of bauxite mined and exported from this area. I also acknowledge that any tribute payable to the former landowners shall be my own responsibility and shall come from the said tribute of $2.00 per ton paid to me.

I hereby also acknowledge that it is my duty and responsibility for the E.M.R.s are registered in my name and not in the name of the Co. to make applications for P.M.L.s in my own name on behalf of Ramunia Bauxite for renewals of such P.M.L.s when they expire.

It is also my intention to give to the Company (Ramunia Bauxite Ltd.) an irrevocable power of attorney to exploit and work these lands and to make all applications for P.M.L.s or mining licences in respect of the above mentioned lands, and any other future acquisitions of bauxite bearing lands. Yours faithfully,

Sgd.

Abdul Kadir bin Ami

Director — Ramunia Buxite Ltd.

[16] Affidavits affirmed by the deceased on 9 October 1985 and 26 January 1986, has been admitted as evidence vide order of court dated 21 January 1989. The deceased had, in his affidavit affirmed on 26 January 1986, refuted the contents of his letter dated 14 February 1952. In para 6 of this affidavit the deceased averred that he did not recall writing this letter. The caption in this letter did not relate to the pieces of land referred to in the First Schedule to the statement of claim as it refers to 41 pieces of land. The contents of this letter contradicts the terms of the 1951 agreement and the power of attorney dated 10 March 1951 and that dated 8 March 1952. The deceased further averred that the sum of RM18,725 paid to him vide the 1952 agreement was not for the purchase of the 41 pieces of lands on behalf of the company (ie the first

defendant), but was part of the consideration paid to him for the right which he gave to the first defendant to enter into possession and mine the lands for bauxite. The deceased also averred that at no time was it envisaged that he was to transfer ownership of the said lands to the first defendant except to facilitate mining.

[17] In para 7 the deceased then alleged that all of the transfer of the lands listed in the Second Schedule to the first defendant were made pursuant to the 1952 agreement for the express purpose of enabling the first defendant to carry out mining operations. As the mining operations had ceased, and that purpose no longer operative, it was alleged that the said lands ought to be returned to him.

[18] The evidence shows that the deceased had executed memorandum of transfers of certain lands in favour of the first defendant in consideration of the 1952 agreement and that the monies portion of the memorandum of transfer has been deleted.

[19] The position at trial was this: of the 41 lots of land described in the Schedule to the 1952 agreement, 29 lots had been transferred to the first defendant between July 1952 and June 1953 by a duly executed transfer executed by the deceased. The deceased however claim that these 29 lots belongs to him despite having executed the transfer to the first defendant, and contended that these 29 lots ought to be transferred back to him upon cessation of mining.

[20] With the 1952 agreement, the deceased also executed a power of attorney dated 8 March 1952 in favour of persons described as 'miners'. The purpose of the power of attorney was to secure the proper carrying and conduct of the mining works on the said lands or other lands under the proprietary mining licences and mining licences which may be issued to the deceased. The powers conferred therein are for the duration of the proprietary mining licences.

OTHER AGREEMENTS EXECUTED BY THE DECEASED

[21] Also in evidence were agreements dated 19 June 1952 between the deceased and several original landowners (including the first defendant) in which agreements the deceased described himself as 'miner'. The third and fourth recital of these agreements states as follows:

> And Whereas the benefit of said Agreement of the 10th March 1951 has been assigned to Ramunia Bauxite Limited of No. 66 High Street, Singapore.

A And Whereas the Miner has further on the 8th day of March 1952 entered into an Agreement with the said Ramunia Bauxite Limited inter alia to enter into possession of the lands described in Part Two of the said Schedule to mine bauxite, aluminium or other ores in the terms and conditions stated in such Proprietary Mining licences or Mining leases as may be issue.

B

CONSEQUENCE UPON DECEASED BEING ADJUDICATED A BANKRUPT

[22] There is also in evidence the fact that the deceased was adjudicated a bankrupt by the Johor Bahru High Court vide Petition No 1 of 1955 on 28 C May 1955. Prior to the deceased being adjudicated a bankrupt, the position of the lands was as follows: The eight lots under the 1951 agreement was in the name of the deceased. Of the 41 lots under the 1952 agreement, 29 lots had been transferred by the deceased in July 1952/June 1953 to the first defendant through duly executed transfers (as opposed to the powers of attorney). The D explanation on there being only 29 lots from the 1952 agreement (as opposed to the 41 lots referred to therein) was explained in evidence from both sides that some of these lots either do not exist, or were acquired by the first and/or second defendant directly, without the intervention of the deceased.

E

[23] The evidence also established the following facts. Upon being adjudicated a bankrupt the deceased was subjected to public examination through the official assignee of the Federation of Malaya on 3 December 1955, 18 December 1955 and 11 January 1956. The report dated 6 January 1959 by the official assignee made no mention of any claim of the type pursued by the F deceased in this case. The enquiries and investigations carried out by the official assignee confirmed the following:

(a) on 3 October 1951, the first defendant was incorporated and the plaintiff was given five shares of $100 each and became one of its first directors, G subsequently resigned as director in October 1954, then disposed of his shares as a result of a dispute with the first defendant over payment of tribute to the original landowners;

(b) the 1951 agreement, the 1952 agreement as well as the agreements of 19 June 1952 were reviewed in the context of the tribute of $2 per ton, with H $1 per ton tribute due to the deceased having been assigned to other parties; and

(c) the first defendant offered the official assignee a sum of $12,500 as an overall settlement of the dispute between the deceased and the first I defendant and the eight lots remaining in the name of the deceased (official assignee) to then be registered in the first defendant's name.

[24] Based on this report, the official assignee had, on 6 January 1959, applied to court (with notice, inter alia, to the deceased and certain of his

creditors) to allow the official assignee to resolve the deceased dispute with the first defendant and execute a proposed agreement with the first defendant in which the eight lots would be transferred to the first defendant in exchange for a sum of $12,500. On 19 February 1959, the official assignee's application was heard before the Honourable Mr Justice Hepworth, judge of the Federation of Malaya, in which that proposed agreement was sanctioned and approved.

[25] On 8 April 1959, the official assignee then executed an agreement with the first defendant, (described as 'the company'), in which the following recitals are significant. The earlier transactions involving the deceased (including the 1951 agreement, the 1952 agreement and the 19 June 1952 agreement) were reviewed. The tenth and 11th recitals of the agreement states as follows:

> AND WHEREAS after full investigation of all the facts the Official Assignee and the Creditors of Abdul Kadir are now satisfied that the true facts are as above stated and that the claims and allegations which Abdul Kadir made in and after January 1955 were false and unfounded.
>
> AND WHEREAS it has now been agreed that the whole position should now be regularised and that in so far as any of the previous written Agreements have been in a form which failed to give effect to the true intentions of the parties as before recited such Agreements should now be rectified in the manner hereinafter appearing and to the extent necessary should be cancelled and treated as never having been effective.

[26] The recitals and the operative terms and conditions of this agreement recognises the agency of the deceased throughout the dealings with the original landowners. The tribute of $1 per ton to the original landowners was the responsibility of the first defendant who undertook to make direct payment henceforth to the original landowners and indemnify the official assignee and the deceased. The deceased was only entitled to $1 per ton for himself but this was admittedly assigned to third parties and the overall dispute will be resolved by a payment of the said $12,500 to the official assignee to be held as part of the estate in bankruptcy of the deceased and to be made available for distribution among his creditors. The eight lots that had been acquired by the deceased as agent of the first defendant would be transferred to the first defendant following the compromise and restatement of the true relationship with the deceased.

[27] In 1984, various original landowners brought an action against the first defendant. The first defendant had compromised these claims on an ex-gratia basis consistent with the indemnity provisions of the agreement dated 8 April 1959 with the official assignee.

[28] The deceased, following the lifting of his bankruptcy in 1983, issued the following demand. By a demand dated 23 April 1985, the deceased sought

to recover the eight lots which the defendant had acquired from the official assignee. Thereafter, by a demand dated 6 August 1985, the deceased also sought to recover the 41 pieces of lands alleging that the same 'had not been transferred inclusive of his title and interest therein'.

THE CLAIM

[29] The deceased started off this action by claiming to be entitled to all of the eight lots in the 1951 agreement and the 41 pieces of land in the 1952 agreement and also for an account of tribute. Of the pleaded claim of 49 lots of land listed in the First Schedule of the statement of claim, the plaintiff's counsel subsequently limited the plaintiff's claim to only 41 pieces of land which had been transferred to the second defendant (para 5 of the statement of claim) and abandoning the eight lots mentioned in the First Schedule of the statement of claim. Thereafter, as to the 41 pieces of land listed in the Second Schedule, the appellant further restricted the plaintiff's claim to only 29 out of the 41 lots. The 29 lots for determination of the court are as follows:

No	Title	Lot No.	Area A.R.P	Transaction No	Transfer No.	Date of Registration
1.	EMR 30	170	2.0.29	144/52	71/29	14.7.1952
2.	EMR 33	168	4.0.23	39/53	23/53	7.6.1953
3.	EMR 36	164	1.3.16	39/53	23/53	7.6.1953
4.	EMR 137	128	2.0.22	145/52	72/52	14.7.1952
5.	EMR 44	169	4.0.01	154/52	81/52	15.7.1952
6.	EMR 37	167	2.1.19	138/52	65/52	14.7.1952
7.	EMR 26	157	2.1.06	159/52	86/52	15.7.1954
8.	EMR 40	161	3.0.33	146/52	73/52	15.7.1952
9.	EMR 38	158	1.1.36	136/52	63/52	14.7.1952
10.	EMR 27	162	2.3.29	149/52	76/52	15.7.1952
11.	EMR 28	163	2.2.30	150/52	77/52	15.7.1952
12.	EMR 124	144	3.1.16	151/52	78/52	15.7.1952
13.	EMR 115	140	2.1.15	23/53	39/53	7.6.1953
14.	EMR 50	148	10.3.20	156/52	83/52	15.7.1952
15.	EMR 43	155	5.1.03	39/53	23/53	7.6.1953
16.	EMR 23	149	5.1.11	39/53	23//53	7.6.1953
17.	EMR 131	145	2.2.04	140/52	67/52	14.7.1952
18.	EMR 35	154	2.0.17	137/52	64/52	14.7.1952
19.	EMR 46	152	1.2.08	153/52	80/52	15.7.1952
20.	EMR 120	136	3.2.04	142/52	69/52	14.7.1952
21.	EMR 119	139	2.1.35	157/52	84/52	15.7.1952
22.	EMR 136	142	3.1.28	152/52	79/52	15.7.1952
23.	EMR 45	165	1.0.28	148/52	75/52	15.7.1952

24.	EMR 132	135	1.2.10	155/52	82/52	15.7.1952
25.	EMR 116	134	0.2.16	147/52	74/52	15.7.1952
26.	EMR 135	137	2.2.11	141/52	68/52	14.7.1952
27.	EMR 29	171	6.3.21	158/52	85/52	15.7.1952
28.	EMR 32	166	1.0.14	143/52	70/52	14.7.1952
29.	EMR 48	173	3.1.29	139/52	66/52	14.7.1952

[30] The deceased's claim (confined to transfer back the 29 lots) is premised on the ground that the first defendant was only B given possessory rights of the said lots by the deceased with the following added contentions. That the previous transfer and registration of the said lots was conferred by the deceased purely to facilitate the mining operations of the first defendant, and the first defendant was bound to transfer back those lots to the deceased upon ceasing mining operations thereon.

[31] Prior to the filing of the action, the 29 lots claimed by the deceased had already been transferred by the first defendant to the second defendant pursuant to an acquisition exercise with some of those 29 lots having been converted for industrial use to complement the then pre-fabrication activities of the second defendant in that vicinity. Given the subsequent dealings, a challenge is made by the deceased adding an allegation of fraud so as to deny the second defendant, as subsequent acquirer, of any equity as an innocent party.

[32] The two witnesses who testified on behalf of the deceased did not have personal knowledge of the assertions in the amended statement of claim.

THE DEFENCE

[33] The respondents' case was that the 29 lots, amongst others, were purchased by the deceased with funds extended by the first defendant's promoters (referred to as 'miners'), on behalf of the first defendant pending its incorporation. It was the defendants' case that the lands had not been purchased by the deceased for his own account but bought for and on behalf of the first defendant using the monies of the first defendant. The deceased was therefore holding these lands on trust for the first defendant. The titles to the lands were registered in the name of the deceased pending incorporation of the first defendant. The 41 lots were subsequently transferred to the first defendant on diverse dates in the 1950's.

[34] Consistent with their rights as registered owner of the lands, the first defendant was free to transfer the 41 lots, amongst others, to the second

defendant for valuable consideration. As the deceased has no legal and/or beneficial interest in the 41 lots, there is no obligation on the defendants to re-transfer the 41 lots to the deceased.

THE INJUNCTION

[35] The record also shows that on 11 November 1986 the deceased had obtained an injunction to restrain the first defendant whether by themselves or by their servants or agents or otherwise howsoever from completing the sale of the 49 pieces of lands or any of them by the first defendant to the second defendant or if such sale has been completed, that the second defendant be restrained whether by itself or by its servants or agents or otherwise howsoever from entering into or completing the sale to any other party. The deceased had averred was that he is the rightful and beneficial owner of the 41 pieces of land and that the first defendant was not entitled to sell, and the second defendant not to purchase, them.

[36] The administrative executive for the second defendant in the affidavit affirmed on 22 March 1986 has referred to a letter dated 15 November 1954 to verify the deceased role in acquiring the said lands for and on behalf of the first defendant.

[37] The first defendant had vide letter dated 8 January 1988 to one of the miners (ie Tow Siang Ling) to render assistance to the solicitors on the dealing of the company with the deceased. The said Tow Siang Ling however did not affirm any affidavit to deny the deceased's contention nor support the first defendant's contention, that the purchases were made by the deceased on behalf of the first defendant.

THE HIGH COURT JUDGE'S FINDINGS

[38] The judge applied the principle that where land is transferred, the transferee assumes a legal proprietorship over it and is not bound to retransfer it back to the transferor unless there is a binding contract obliging him to do so. He ruled that the onus lies on the plaintiff to prove by a preponderance of probabilities that there was such an agreement.

[39] The learned judge's reading of the agreements executed between the parties was that there was no agreement binding the second defendant to retransfer the 29 lots of land back to the deceased upon cessation of mining activities or at any time. From the evidence adduced the judge held that it cannot be inferred that the contracting parties intended the lands concerned to be retransferred back to the deceased after cessation of mining activities. The judge was of the view that the instances mentioned by the deceased were

unilateral conjectures of the deceased which were incapable of constituting a legally enforceable obligation on the part of the first defendant to retransfer the lands back to the deceased.

[40] The learned trial judge finding was that the three preambles in the 1952 agreement established the fact that the lands were purchased for and on behalf of the first defendant. The letter written by the deceased dated 14 December 1952 was accepted by the judge as corroborative evidence of the declaration in the recital to the 1952 agreement. The recitals to the 1952 agreement and letter dated 14 February 1952 written by the deceased established the fact that the lands were purchased by the deceased for and on behalf the first defendant on the first defendant's funds.

[41] From these proved facts the learned judge then concluded that the deceased was merely holding the 29 lots of land claimed by the deceased on trust for the first defendant. On a preponderance of probability the trial judge's held that it has not been proved that there was any agreement to retransfer the lands back to the deceased at any time after the cessation of mining.

[42] As the registered proprietor of the 29 lots, the first defendant was free to transfer them to the second defendant. The deceased claim against both the defendants were then dismissed with costs.

THE APPELLANT COUNSEL'S SUBMISSIONS

[43] The consideration of this case involve the drawing of inferences from the contemporaneous documents. An appellate court was in as good a position as the trial court to form an independent opinion as to the inferences that ought to be drawn from such evidence and should readily interfere with such findings based upon the inferences drawn.

[44] The appellant's counsel submitted the judge should have taken into account the motive for the first defendant's director in writing the letter dated 15 November 1954 to verify the deceased's role in acquiring the said lands for and on behalf of the first defendant. The defendants' inability via DW1 to verify the reasons for the compensation paid out by the defendants to the alleged landowner, (when the said lands were already in the name of the defendants) which form part of the 29 pieces of lands claimed, should have been taken into consideration by the learned judge. The unilateral variation to the terms of the 1952 agreement by the first defendant with the official assignee had also not been taken into consideration by the learned judge.

[45] The appellant's counsel submitted the affidavits affirmed by the solicitors for the defendants and the administrative executive of the second

A defendant cannot refute the deceased's averments which are based on personal knowledge, while the latter, were the deponent's opinion based on the documents in their possession. The more probable inference to be drawn should be the deceased's version and not that of the defendants.

B

[46] In respect the letter dated 15 November 1954, the court should not give any weight to this letter as it was written by the Tow Siang Ling after the deceased had resigned as a director of the first defendant in October 1954 after a dispute. The credibility of the writer of the said letter is in doubt as he had failed to come forward to affirm any affidavit in reply to the matters in issue.

C

[47] The evidence proves that the lands originally purchased by the deceased on his own behalf were later transferred to the first defendant for the purpose of mining bauxite by the first defendant of which the deceased was a shareholder and director. The deposit of the titles to the miners were merely to facilitate the mining operations, and not an outright transfer of the deceased's proprietary interest. The terms of the 1951 agreement dismisses the contention that the defendants had forwarded the purchase monies to enable the deceased to purchase the said lands from the original landowners.

D

E

[48] By agreement dated 10 November 1950 entered by the deceased with 18 landowners, the deceased purchased 9 lots (namely Lot Nos 159, 160, 280, 175, 176, 177, 178, 180 and 118). This was a direct purchases from the original landowners. The deceased paid the purchase price for these lots. These nine lots were renumbered as eight lots as per the First Schedule to the amended writ and statement of claim. The deceased subsequently applied for proprietary mining licence in his own name and was issued with the said licence on 27 January 1951 over the eight lots, to be renewed from time to time for successive terms of two years throughout a period of 21 years from 27 January 1951. The deceased was the registered owner of these eight lots.

F

G

[49] The deceased had entered into the 1951 agreement with the four miners (ie Wong Shee Fun, Tow Keng Hee, Tow Siang Ling and Ng Yook Lin) as proprietor. The miners entered into possession of the eight lots, carried out mining operations for a consideration of RM20,000. The deceased then entered into the 1952 agreement (as proprietor) with the first defendant (the miners), consistent with the 1951 agreement. The recitals to the 1952 agreement shows the deceased to be the proprietor of the lands listed in the Second Schedule to the amended writ and statement of claim.

H

I

[50] Various sums of monies were advanced by the miners to the deceased consistent with cl 1 in the 1951 agreement as consideration to allow the miners to enter into possession, but not as purchase price of the said lands.

[51] Clauses 7 and 8 retained the deceased's proprietary rights. The right to be indemnified, the right to enter and inspect, and the right to inspect the books to account for the ore produced. The deposit of the titles to the said land with the miners was but to ensure that during the continuance of the said agreement the deceased cannot sell, charge or in any way encumber the land. The deceased's responsibility as the proprietor to pay the tribute to the original landowners further supports the deceased's proprietary rights.

[52] The appellant counsel submitted that the payment of tribute clause in the 1951 and 1952 agreement supported the deceased's contention on a reversionary right upon cessation of mining operations. In finding that the deceased was holding the 29 lots of land on trust for the first defendant, the learned judge failed to take into consideration recital four, the purpose of the acquisition being to enable the miners to prospect and mine the bauxite and aluminium ores or any other mineral, and recital 10, the undertaking on the part of the deceased not to sell, charge or in any way encumber the said lands. The power of attorney not conferring upon the miners the power of sale, and limiting the power of attorney for the duration of the term of the proprietary mining licence had also not been taken into consideration by the learned judge.

[53] The construction to be given to the documents executed according to the appellant's counsel was this. The deceased had acquired the said lands as proprietor and paid the purchase price. The deceased acquired financial assistance prior to the meeting with the miners. Proprietary mining licence was then acquired by the deceased by which licence he was authorised to mine for bauxite and aluminium ores from 27 January 1951 for successive terms of two years throughout a period of 21 years. The first defendant was then incorporated to carry out the mining works. The deceased transferred the said lands to the first defendant to facilitate the mining operations. The deceased, inter alia, retained the right of entry and the right to inspect the books of account of the first defendant. The deceased received payment of tribute from the bauxite and ores produced on the land but was equally responsible for the payment of tribute to the original landowners. The deceased executed powers of attorney in favour of the first defendant for the purpose of the proprietary mining licence to facilitate the mining operations. The deceased deposited the titles to the said lands with the first defendant as security that during the tenure of the mining operations, the deceased will not encumber the said lands.

[54] The agreement dated 9 June 1952 entered into by the deceased with the landowner, Syed Nit bin Ali, (unlike the other agreements entered by the deceased as proprietor) is an instance where the deceased had purchased a land for and on behalf of the first defendant. The vendor (ie the original landowner) in this agreement had expressly relinquished all title and interest in the said land in favour of the first defendant and the sum of RM998.66 was expressed

as the purchase price. Clause 1 relinquishes the landowner's title and interest in the land. Clause 2 provides that the purchaser (ie the first defendant) shall thereafter be entitled to all rents and profits derived on and from the said land.

[55] The appellant's counsel urged this court to forbid the defendants to use the register as an instrument of fraud. The appellant's counsel submitted that sufficient evidence had been led to support the deceased's assertions. The appeal should accordingly be allowed, the claim for the transfer of the 29 pieces of land as listed should be allowed.

THE RESPONDENTS' SUBMISSIONS

[56] It is common ground that the deceased acquired a proprietary mining licence and was authorised to mine for bauxite and aluminium ore from 27 January 1951 for successive terms of two years throughout a period of 21 years. That the first defendant was incorporated to carry out the mining works. The deceased had acquired the lands and the proprietary mining licence before his acquaintance with the miners and had retained the right of entry and the right to inspect the books of accounts of the first defendant, and entitled to receive payment of tribute from the bauxite and ores produced on the land and being equally responsible for the payment of tribute to the original landowners.

[57] The respondents counsel's highlighted transactions entered directly by the first and second defendants with the original landowners and/or their administrators. The agreement dated 9 June 1952 between the deceased with the landowner, Syed Nit bin Ali, is an instance where the deceased has purchased the said land for and on behalf of the first defendant. The vendor (ie the original landowner) had expressly relinquished all title and interest in the said land in favour of the first defendant. The deceased had entered into this agreement as purchaser, for and on behalf of the first defendant. The consideration of RM998.66 is expressed as the purchase price. Clause 1 expressly relinquishes the landowner's title and interest in the said land. Clause 2 expressly provides that the purchaser (ie the first defendant) shall hereinafter be entitled to all rents and profits derived on and from the said land. The vendor also unequivocally appoints the first defendant as his lawful attorney to apply for proprietary mining licence and to do all acts necessary to facilitate the transfer of the said land and the mining operations.

[58] Also highlighted was the agreement between Syed Abdullah bin Ismail and second defendant for the transfer of 2/5 of EMR 41, Lot No 156, the agreement between Syed Abdullah bin Ismail and second defendant for the transfer of 1/5 of EMR 41, Lot No 156, the agreement between Syed Abdullah bin Ismail and the second defendant for the transfer of EMR 34, Lot 153, the agreement between Syed Mohsin bin Jaafar and the first defendant for the

transfer of EMR 42, Lot 150. The terms of all of these sale agreements unequivocally refers to an outright sale of the lands specified in the agreement to the respective defendant. The terms expressly state the purchase price, the transfer of all interest and title in the said lands to the defendants. Equally, the memorandum of transfer refers to the purchase price being the consideration for the transfer. Exhibit PB3 confirms the direct acquisition of the said lands which is not in dispute. The Form 14A executed by Syed Abdullah bin Ismail was in favour of the second defendant for the transfer of 2/5 of EMR 41, Lot No 156. The memorandum of transfer executed by Salleh bin Malik was in favour of the first defendant for EMR 125, Lot 143.

[59] Thus, the documentary evidence and contemporaneous or near contemporaneous documents shows on a preponderance of probability that the deceased had failed to prove that there was any agreement to retransfer the 29 lots lands back to the deceased at any time after the cessation of mining. There is no evidence to support the pleaded case, that by the terms of the 1952 agreement, the first defendant was obliged to retransfer the 29 lots to the deceased. Instead, as noted by the learned trial judge, the clear words of the recitals to 1952 agreement negates any such agreement.

[60] The appellant did not deal with the recitals of the 1952 agreement at the High Court. The appellant sought to contend an inconsistent and misleading manner that the various sums of monies were advanced by the miners to the deceased, as agreed by both parties in the 1951 agreement at cl 13, which is consistent with cl 1, wherein the said 'various sums of monies' amounting to RM18,725 is classified as the consideration paid by the miners, and accepted by the proprietor (ie the deceased to allow the miners to enter into possession of the said lands. The refusal to accept the clear and plain meaning of the recitals has led, in the words of the trial judge, 'to unilateral conjectures'. Given the clear and unambiguous words of the recitals, there was very little the trial judge could do but to give effect to their plain meaning to find as he did, and to dismiss the appellant's claim.

[61] As registered proprietor of the lands in issue at that particular point in time, the deceased was the person who could take out the proprietary mining licences. In this case the first defendant gave a back to back undertaking to the deceased when those proprietary mining licences were in his name. However, when the lands were transferred in the name of the first defendant, the mining licences follow the title, and the back to back provisions were accordingly spent.

[62] The 1951 agreement therefore was nothing more than a remuneration arrangement by the deceased with third parties in relation to the earlier eight lots (since abandoned by the plaintiff) and not to the 29 pieces claimed.

[63] On the weight to be attached the averments contained the deceased affidavits, the respondent's counsel submitted notwithstanding the order of court dated 21 January 1989 directing the affidavits of the deceased being admissible without calling the makers as witnesses, this does not mean the trial judge is to treat the same as unrebutted and uncritically accept the statements averred to in those affidavits. The proper approach, as enunciated by in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 at p 220, requires the court to judicially appreciate the affidavit evidence by testing the assertions made therein against contemporaneous documents to see if the assertions are inherently improbable or incredible or patently inconsistent.

[64] This approach was recognised by the learned trial judge in making a considered decision in this case. The deceased's denial of the letter of 14 February 1952 was clearly inconsistent with the recitals of the 1952 agreement. If indeed the contents of the deceased's letter of 14 February 1952 were untrue, then the deceased would surely not have repeated his acknowledgement, that the lands were purchased with the first defendant's funds for and on behalf of the first defendant in the recitals to the 1952 agreement which postdates the letter of 14 February 1952. The trial judge's evaluation of the evidence, and conclusion that the letter of 14 February 1952 corroborates the recitals to the 1952 agreement, was accordingly correct.

[65] On the contention that the trial judge failed to take into account the motives of the first defendant's director to write the letter dated 15 November 1994, this was baseless as no evidence was led to establish motive of any sort on the first defendant's director.

[66] There was no explanation how any intention to retransfer can arise when the deceased had, by the clear words of the recitals to the 1952 agreement, recognised, amongst others, that the 29 lots were purchased by him with the first defendant's funds for and on behalf of the first defendant.

[67] Applying the principle of construction, the recitals being clear, they therefore govern the construction of the instrument. Effect must be given to its plain meaning. Consequently the claim fall and the suit rightly dismissed.

[68] From the grounds of judgment the trial judge was more than satisfied, having regard to the recitals to the 1952 agreement and letter of 14 February 1952 that the claim against the defendant had not been proved. There was therefore no requirement to enquire into the ex-gratia compensation paid to original landowners which in any event had been clarified by DW1 in her witness statement and in cross examination.

[69] The respondents pray that this appeal be dismissed with costs.

DECISION

[70] The High Court judge approached this case on a core basis by posing the question whether there was a contractual obligation for retransfer of the 29 lots claimed? The learned judge's finding was that it was unsupported by the 1952 agreement which the deceased had sought to rely in part, and disregard other parts.

[71] In *Federal Flour Mills Bhd v Fima Palmbulk Services Sdn Bhd and another appeal* [2005] 6 MLJ 525 at p 532F Ariffin Zakaria FCJ, speaking for the Court of Appeal, adopted Sir John Romilly MR's observations in *Re Strand Music* to the effect that 'The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another and more express clause in the same deed. I think that I must, if possible, give effect to both these clauses in the articles in question'.

[72] In respect the reference to 'mining leases' to support the position to contend that the deceased must have been the proprietor to collect tribute, this argument required the court to disregard the recitals to the 1952 agreement. The 1952 agreement to which the 29 lots are concerned, is not about 'mining leases'. This is not a case of a 'mining lease', but ownership by the deceased 'for and on behalf of the first defendant, with monies obtained from the first defendant'. The 1952 agreement understandably did not provide for any transfer, nor did the powers of attorney envisaged this, because it was envisaged that the lands will be in the name of the deceased, albeit providing for protection of ownership by restrictive provisions governing selling or charging.

[73] From the evidence adduced by the defendants, and that of the deceased himself, all of the 29 lots had been transferred in 1952 and 1953 save for one in 1954. The transfers were effected by the deceased's action himself pursuant to the terms of the 1952 agreement. I am in agreement with the respondents' counsel that the agreement clearly came to an end consequent upon the transfers, leaving only the sharing of benefits of the tribute as between the deceased and the original land owners.

[74] In respect of the document admitted for trial through the deceased's earlier affidavit, upon the bankruptcy of deceased, the official assignee had investigated into the relationship between the deceased, the original land owners, the first defendant as well as other third parties. This culminated in an agreement executed by the official assignee with the first defendant wherein the role of the deceased (as agent of the first defendant) was reiterated for purposes

of insulating his estate in bankruptcy. The eight lots were then transferred to the first defendant. The 1952 agreement, concerning tributes to the deceased, clearly came to an end in exchange for RM12,500 payment to the official assignee. Thereafter, the first defendant then became responsible to the original land owners and the third party financiers.

[75] On my part, I am of the view having regard to the agreements executed and the contemporaneous documents exchanged, the High Court judge had no choice but to conclude that throughout the relationship, the deceased was no more than a self acknowledged agent of the first defendant. The agreement dated 14 May 1952 (with the land owner covering one of the 29 lots, namely EMR 23), agreement dated 14 May 1952 (with another land owner covering one of the 29 Lots, namely EMR 43), agreement dated 19 June 1952 (with another land owner covering another of the 29 lots, namely EMR 115), all acknowledged that those lots formed part of the 29 lots purchased by the deceased 'for and on behalf' of the first defendant.

[76] I am thus in agreement with the respondents' counsel submission that this was an opportunistic claim that started off by making an unjustified overstated claim of ownership over the eight lots, and all of the 41 lots allegedly derived from the 1951 agreement and the 1952 agreement. The reason why only 29 lots arose had been explained in the defendants' evidence setting out a Schedule as to the reasons why. The position on the eight lots was also explained in the defendant's evidence vis-a-vis the admitted documents concerning the official assignee in adjusting rights way back in 1959. It is only then that the claim to the eight lots was abandoned, and confined to 29 lots. The uncontroverted evidence before the court was that, not only the eight lots, but also the now confined claim to the 29 lots, were already registered in the name of the second defendant prior to the commencement of the action.

[77] As to the fraud allegation which was introduced by the plaintiff in 1988 by way of amendment, I am of the view that there is no cogent evidence to support this serious allegation and to sustain an argument against the indefeasibility of title acquired by the second defendant.

[78] Thus, based on the evidence adduced, I am of the view that the deceased's claim is unjustified, tainted with an absence of bona fide when considered against the attempt to initially include all pieces of land when this was clearly unsustainable. The unconscionability of the claim is also borne out by the fact that this claim was never intimated nor disclosed by the deceased to the official assignee in the 1950's when the dispute with the deceased was to have been finally resolved.

[79] The trial judge was therefore correct in holding that there is no basis to

challenge the indefeasible title acquired by the first defendant, who in turn has properly passed on ownership to the second defendant. The second defendant certainly could not be expected to have knowledge of the deceased's claim made some 30 years after registration first to the first defendant, and some 12 years after mining activities on those lots had ceased, with the second defendant having since altered the attributes of those lots.

[80] In conclusion I am of the view that the learned trial judge had assessed, weighed the contemporaneous documents, tested the oral evidence against them, considered the probabilities of the case, and was right in arriving at the findings and the conclusion which he did.

[81] For the above reasons, on my part, the appeal is dismissed with costs. The deposit to the respondents to account of costs.

Abdul Malik Ishak JCA:

INTRODUCTION

[82] After a full trial, the learned judge of the High Court dismissed the plaintiff's claim with costs. Aggrieved, the plaintiff filed an appeal to this court against the whole decision of the learned judge of the High Court.

[83] Abdul Kadir bin Ami was the original plaintiff and he initiated the proceedings. Unfortunately, he passed away before the trial. His daughter as the authorised representative continued with the proceedings. Two of his children gave evidence, namely:

(a) Dato Dr Zaharah bt Abdul Kadir ('PW1'); and

(b) Yahya bin Abdul Kadir ('PW2').

[84] While the defendants called only one witness in the person of Khoo Gim Hoon ('DW1').

[85] Documentary evidence as well as contemporaneous or near contemporaneous evidence were highlighted by the parties in this appeal.

[86] It is common ground that the three witnesses do not have personal knowledge of the issues arising on the claim and the defence. Thus, before the learned judge of the High Court documentary evidence was highlighted and His Lordship decided the case based on the available documentary evidence as

perceived by him.

THE FACTS

[87] The deceased appellant was a businessman. In 1950, the deceased appellant became the registered proprietor/beneficial owner of eight pieces of land as listed in the First Schedule to the amended writ and the statement of claim by purchasing the eight pieces of land from their owners ('eight pieces of land').

[88] Between 1951 and 1952, the deceased appellant became the registered proprietor/beneficial owner of 41 pieces of land as listed in the Second Schedule to the amended writ and the statement of claim by purchasing 40 pieces of land from their previous owners and acquiring the remaining one piece of land from the Johor State Government by way of an alienation ('41 pieces of land').

[89] Now, it is important to mention that the first respondent — Ramunia Bauxite Pte Ltd, is a limited liability company that was incorporated on 3 October 1951 and, at all material times, the first respondent was engaged in bauxite mining at Pengerang, Johor. Incidentally, the first respondent is the wholly owned subsidiary of the second respondent.

[90] By way of an agreement dated 10 March 1951, the deceased appellant pursuant to the promises as set out in the said agreement allowed four persons, namely:

(a) Wong Shee Fun;

(b) Tow Keng Hee;

(c) Tow Siang Ling; and

(d) Ng Yook Lin to enter into possession of the eight pieces of land in order to carry out mining operations therein.

[91] And by way of an agreement dated 8 March 1952 between the deceased appellant and the first respondent, the deceased appellant allowed the first respondent to enter into possession of the 41 pieces of land in order to carry out mining operations therein upon the terms and conditions contained therein. Later, the 41 pieces of land were transferred and registered in the name of the first respondent pursuant to the terms of the agreement dated 8 March 1952.

[92] By virtue of a term in the agreement dated 10 March 1951 — pertaining to the eight pieces of land, a company was incorporated in Singapore in October 1951. That company was called Ramunia Bauxite Pte

Ltd — the first respondent herein. It must be borne in mind that the deceased appellant was made a director of the first respondent from its inception until 1954.

[93] By virtue of the agreements dated 10 March 1951 and 8 March 1952, the first respondent obtained the right to enter possession into the eight pieces of land and the 41 pieces of land respectively for mining purposes subject to payment of tributes to the deceased appellant.

[94] On 28 May 1955, the deceased appellant was adjudicated a bankrupt by the Johor Bahru High Court vide Petition No 1 of 1955. It was only on 12 January 1983 that the said bankruptcy was annulled.

[95] In 1959, while the deceased appellant was still a bankrupt, the official assignee, Malaya without the knowledge of the deceased appellant sold the eight pieces of land listed in the First Schedule to the first respondent for a paltry sum of $12,500. At this juncture, the deceased appellant took the position that the claim for the eight pieces of land will not be pursued at the trial.

[96] Now, after the deceased appellant was discharged as a bankrupt he instructed his solicitors to enquire as to the status of the mining licence. The deceased appellant was told that the mining operations had ceased in 1973. This prompted the deceased appellant to demand through his solicitors for the transfer of the 41 pieces of land from the first respondent.

[97] It was averred that the first respondent has fraudulently refused to transfer the 41 pieces of land to the deceased appellant as stipulated by the terms of the agreement dated 8 March 1952 and instead has transferred the 41 pieces of land to the second respondent — Promet Bhd.

[98] On 11 November 1986, the deceased appellant succeeded in obtaining an injunction to restrain the respondents whether by themselves or by their servants or agents or otherwise howsoever from completing the sale of the 41 pieces of land or any of them by the first respondent to the second respondent or if such sale has been completed the second respondent be restrained whether by itself or by its servants or agents or otherwise howsoever from entering into or completing the sale thereof to any other party.

[99] It was the contention of the deceased appellant that he is the rightful and beneficial owner of the 41 pieces of land and, consequently, the first respondent is not entitled to sell the said land to the second respondent and/that the second respondent may not purchase the said land.

[100] At the trial before the learned judge of the High Court, the deceased appellant only pursued the claim for the 29 pieces of land. The list for the 29 pieces of land can be found at the appeal record at Vol 4 at pp 430–431 and they are now itemised as follows:

No.	Title	Lot No.	Area A.R.P.	Transaction No.	Transfer No.	Date of Registration
1	EMR 30	170	2.0.29	144/52	71/29	14-7-1952
2	EMR 33	168	4.0.23	39/53	23/53	7-6-1953
3	EMR 36	164	1.3.16	39/53	23/53	7-6-1953
4	EMR 137	128	2.0.22	145/52	72/52	14-7-1952
5	EMR 44	169	4.0.01	154/52	81/52	15-7-1952
6	EMR 37	167	2.1.19	138/52	65/52	14-7-1952
7	EMR 26	157	2.1.06	159/52	86/52	15-7-1954
8	EMR 40	161	3.0.33	146/52	73/52	15-7-1952
9	EMR 38	158	1.1.36	136/52	63/52	14-7-1952
10	EMR 27	162	2.3.29	149/52	76/52	15-7-1952
11	EMR 28	163	2.2.30	150/52	77/52	15-7-1952
12	EMR 124	144	3.1.16	151/52	78/52	15-7-1952
13	EMR 115	140	2.1.15	23/53	39/53	7-6-1953
14	EMR 50	148	10.3.20	156/52	83/52	15-7-1952
15	EMR 43	155	5.1.03	39/53	23/53	7-6-1953
16	EMR 23	149	5.1.11	39/53	23/53	7-6-1953
17	EMR 131	145	2.2.04	140/52	67/52	14-7-1952
18	EMR 35	154	2.0.17	137/52	64/52	14-7-1952
19	EMR 46	152	1.2.08	153/52	80/52	15-7-1952
20	EMR 120	136	3.2.04	142/52	69/52	14-7-1952
21	EMR 119	139	2.1.35	157/52	84/52	15-7-1952
22	EMR 136	142	3.1.28	152/52	79/52	15-7-1952
23	EMR 45	165	1.0.28	148/52	75/52	15-7-1952
24	EMR 132	135	1.2.10	155/52	82/52	15-7-1952
25	EMR 116	134	0.2.16	147/52	74/52	15-7-1952
26	EMR 135	137	2.2.11	141/52	68/52	14-7-1952
27	EMR 29	171	6.3.21	158/52	85/52	15-7-1952
28	EMR 32	166	1.0.14	143/52	70/52	14-7-1952
29	EMR 48	173	3.1.29	139/52	66/52	14-7-1952

[101] The authorised representative of the deceased appellant by the name of Zaharah bt A Kadir fashioned her claim based on the amended statement of claim. At para 14 of the amended statement of claim, fraud was alleged and it was worded in this way (see p 58 of the appeal record at Vol 1):

14 The 1st Defendant has fraudulently refused to transfer the said 41 pieces of land to the Plaintiff as required by the terms of the Agreement dated 8th March 1982 and has transferred the lands away to the 2nd Defendant.

[102] And the particulars of fraud were listed in this way (see also p 58 of the appeal record at Vol 1):

PARTICULARS OF FRAUD

14.1 By the Agreement of 8th March referred to in paragraph 7 above the Plaintiff agreed to allow the 1st Defendant to enter into the 41 pieces of land for the purpose of mining only. Subsequent thereto on the same date the Plaintiff appointed the 1st Defendant as the Plaintiffs Attorney by a Power of Attorney to do all things necessary in connection with its mining activities but without the power to transfer the lands.

14.2 The 1st Defendant has on or about 4th September 1983 transferred the said 41 pieces of land to the 2nd Defendant knowing that by such act the interest of the Plaintiff in the said 41 pieces of land would be jeopardised.

14.3 The 1st Defendant knew at the time of such transfer of the said 41 pieces of land that it did not hold the lands as beneficial owner as the 1st Defendant was bound to transfer the lands back to the Plaintiff upon ceasing mining operations therein.

14.4 The 2nd Defendant is the holder of four (4) million ordinary shares in the 1st Defendant being the whole of the issued shares of the 1st Defendant.

[103] By raising fraud and particularising fraud, there was compliance with *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615, where it was held that pleadings served to define and delimit with clarity and precision the real matters in controversy between the parties so that the parties could prepare their respective cases and the court would be in a better position to adjudicate the case.

[104] Pleadings too would assist the parties to identify and isolate the issues in dispute easily. In this way, the parties would be able to effectively prepare their cases for trial (*Thorp v Holdsworth* (1876) 3 Ch D 637 at p 639). Thus, the element of surprise at the trial is prevented at its inception (*Palmer v Guadagni* [1906] 2 Ch 494 at p 497) and the parties need only concentrate on gathering evidence according to the issues gleaned from the pleadings (*Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218 (HL) at p 238).

[105] Inter alia, the authorised representative of the deceased appellant sought for the following prayers:

(a) for an order that the first respondent do sign, execute, seal and deliver to the appellant and/or her nominees duly perfected instruments of transfer

of all the 29 pieces of land (it will be demonstrated later that only 26 pieces of land will be involved) together with the documents of title thereto; and

(b) for an order that the first and the second respondents do deliver up the agreements of sale or other instruments relating to the ontended sale of 29 pieces of land (it will be demonstrated later that only 26 pieces of land will be involved) for cancellation.

THE PLEADED CLAIM AND PLEADED DEFENCE

[106] In regard to the 29 pieces of land, the deceased appellant's pleaded claim which was continued by the authorised representative is this: that the first respondent is required by the terms of the 1952 agreement to retransfer the 29 pieces of land to the deceased appellant as the beneficial owner upon the cessation of the mining operations in 1973.

[107] In the amended statement of claim, particulars of fraud perpetrated by the first respondent were set out.

[108] The respondents' defence was this. That the 29 pieces of land were purchased by the deceased appellant with funds extended by the miners in relation to the 1952 agreement, for and on behalf of the first respondent. And that the titles to the 29 pieces of land were registered in favour of the deceased appellant.

[109] That the 29 pieces of land were then transferred by the deceased appellant to the first respondent on diverse dates in the 1950s and consistent with the first respondent's rights as the registered owner, the 29 pieces of land were subsequently transferred to the second respondent for valuable consideration.

THE DECISION OF THE HIGH COURT

[110] The learned judge of the High Court in his grounds of judgment alluded to the following matters in dismissing the deceased appellant's claim:

(a) that the second respondent as registered proprietor of the 29 pieces of land is not bound to retransfer them to the deceased appellant unless there is a binding contract that obliges the second respondent to do so;

(b) that the onus of proving that there was such a contract or agreement lies on the deceased appellant who is making the assertion;

(c) that no such evidence was adduced of any such contract or agreement but instead the court was invited to draw inferences from certain facts established before the court;

(d) that the preambles to the 1952 agreement and a letter dated 14 December 1952 written by the deceased appellant shows that the 29 pieces of land were purchased by the deceased appellant for and on behalf of the first respondent using the first respondent's funds;

(e) that the deceased appellant merely held the 29 pieces of land on trust for the first respondent and the deceased appellant had failed to prove on a preponderance of probability that there was any contract or agreement to retransfer the 29 pieces of land to the deceased appellant after the cessation of the mining operations in 1973; and

(f) that the first respondent as the registered proprietor was free to transfer the 29 pieces of land to the second respondent.

ANALYSIS

[111] A perusal of the grounds of judgment of the learned judge of the High Court would show that there is insufficient judicial appreciation of the evidence in arriving at the abovementioned findings. The appellate court will readily interfere with the trial judge's finding of fact and embark on an exercise of its own in order to form an independent opinion especially in a situation where a finding of fact depends principally on inferences drawn from other facts as opposed to a finding of a specific fact which depends upon the credibility of witnesses. As observed, the deceased appellant's case rests upon documentary evidence in the form of contemporaneous or near contemporaneous documents and correspondences as well as sworn affidavits to support the deceased appellant's assertions on the balance of probabilities.

[112] The word 'evidence' as used in judicial proceedings has several meanings. Firstly, it relates to arguments and inferences where the courts are informed as to the issues of fact as ascertained by the pleadings. Secondly, the subject matter of the evidence as adduced through witnesses and documents. Thirdly, it denotes that some fact may be admitted as proof and that fact has relevance to the issues of fact. Fourthly, it refers to evidence that is placed before the court in order that the court may decide the issues of fact.

[113] The primary evidence par excellence of the contents of a document is the original: it is the document itself. While secondary evidence may take the form of all manner of different types of copy, including those proved by testimony to have been checked against the original which are known as 'examined copies', and those bearing a certificate of their accuracy are called as 'certified copies'. Lord Esher in *Lucas v Williams & Sons* [1892] 2 QB 113 (CA), at p 116 aptly said:

A … primary evidence is evidence which the law requires to be given first; secondary evidence is evidence which may be given in the absence of that better evidence which the law requires to be given first, when a proper explanation is given.

B **[114]** Section 61 of the Evidence Act 1950 enacts as follows:

The contents of documents may be proved either by primary or by secondary evidence.

C **[115]** According to Ahmad J in *Jai Gopal Singh and others v Divisional Forest Officer* AIR 1953 Patna 310 at p 311:

What constitutes primary evidence in the case of a document is defined in s 62. The secondary evidence is defined in s 63, and under cl (5) of that section an oral account of the contents of a document given by some person who has himself seen it is also
D secondary evidence. But s 64 says that 'documents must be proved by primary evidence except in the cases hereinafter mentioned'. Section 65 gives the list of cases in which secondary evidence may be given of the existence, condition or contents of a document. It has got seven clauses.

E **[116]** The learned judge of the High Court must test the available evidence against the probabilities of the case. And a decision arrived at by the learned judge of the High Court without appreciation of the available evidence would attract appellant intervention. Once the appellate court has intervened, the
F decision would be set aside.

[117] Lord Pearce's dissenting speech in *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 (HL) at p 430, merits reproduction:

G The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or a miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even
H though it may appear that the appellant may in the end fail to secure a judgment in his favour. But the fact that the right party seems to have succeeded in the court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

I **[118]** In *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517 (FC), Mohamed Dzaiddin FCJ (later Chief Justice) delivering the judgment of the Federal Court laid down the law in these lucid words (see pp 527–528 of the report):

In the light of the above findings of the learned judge, a fundamental question of principle arises — which is, whether in the circumstances of the case, this court can interfere with the findings of fact of the court below. It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the court below should be disturbed by a court of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy (*Crofter Hand Woven Harris Tweed Co Ltd & Ors v Veitch & Anor* [1942] 1 All ER 142 (HL) per Lord Porter at p 167). However, the authority for the above proposition is the speech of Lord Thankerton in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582, particularly the following passage (at p 587):

(a) Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

(b) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

(c) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

On the other hand, there is a clear authority also from the House of Lords – and followed by the Privy Council — which says that a distinction can be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and form an independent opinion than in the case of the former. That authority is the speech of Lord Reid in the House of Lords' decision in *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326, followed later by the Privy Council in the Singapore case of *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 at p 94. At p 329, His Lordship stated:

> *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 was a consistorial case based on cruelty, and I think that the whole passage which I have quoted refers to cases where the credibility or reliability of one or more witnesses has been in dispute, and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. If that be right, then I see no reason to doubt anything that was said by Lord Thankerton. But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion.

In *Tay Kheng Hong v Heap Moh Steamship Co Ltd*, the Singapore Court of Appeal found there was a considerable volume of independent evidence both documentary and oral which was consistent only with the respondents' case. It held that the trial judge was wrong in accepting the appellant's evidence. On appeal, the Privy Council held that the Court of Appeal's acceptance of the witness's evidence depended on inferences from documents. However, these inferences were insufficient material to entitle them to reject the result arrived at by the trial judge.

In the present case, it is apparent to us that the learned judge based her findings after considering the evidence of the witnesses and the documents; and clearly, her conclusions were based on inferences drawn from them. In our view, the learned judge did not make any specific finding of fact based on the evidence of PW3 and DW3 and the documents. Although she accepted the evidence of PW3 and DW3 as the most telling, there was nothing in her judgment which indicated her decision was based on the credibility of the witnesses or as a result of the impression she formed of them. At any rate, we will also show that her acceptance of their evidence was wrong. As for the second issue, her conclusion depended entirely on inferences drawn from the three agreements, AB22, 26 and 29. Since the present case does not involve the question of credibility of the witnesses, we are satisfied, following the Benmax principle, that we are in as good a position to review and evaluate the evidence of the case as the trial judge.

[119] In *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87, Lord Guest at p 92 had this to say:

There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt (or Thomas) v Thomas* [1947] AC 484 at p 487; [1947] 1 All ER 582 at p 587:

(a) Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

(b) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

(c) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

[120] In *Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh* [1997] 2 MLJ 373 at p 379, this court speaking through Gopal Sri Ram JCA had this to say:

> Unless we, as a court of appeal, are convinced that there was no judicial appreciation of the evidence by the trier of fact, or that the audio-visual advantage reserved to a trial judge had been missed or that the findings made do not accord with the probabilities of the case when taken as a whole, it would not be open to us to intervene and upset the findings made by a trial judge.

[121] The speech of Lord Denning MR in *Kerry v Carter* [1969] 1 WLR 1372 (CA) at p 1376, is worth repeating. There His Lordship said:

> We have been referred to cases on this subject, particularly the recent case of *Brown v Thompson* [1968] 1 WLR 1003. Since that case it seems to have been assumed in some quarters that this court will rarely, if ever, alter an apportionment made by the judge. Such is a misreading of that case. I think that the attitude of this court was correctly stated in that case, at p 1012, by Edmund Davies LJ when he quoted from the judgment of Sellers LJ in *Quintas v National Smelting Board* [1961] 1 WLR 401 at p 409. This court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts: but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a Court of Appeal. We are here to put right that which has gone wrong. If we think that the judge below was wrong, then we ought to say so, and alter the apportionment accordingly.

[122] The trial judge at the High Court in the case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 found the plaintiff in that case guilty of fraudulent misrepresentation based on the veracity of the defendant and its witnesses, but on appeal, Chang Min Tat FCJ speaking for the Federal Court reversed the High Court judge's finding of fraud. At p 234, Chang Min Tat FCJ said:

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[123] In *Yusoff bin Kassim v Public Prosecutor* [1992] 2 MLJ 183 at p 188, Edgar Joseph Jr SCJ speaking for the Supreme Court aptly said:

A We recognised that the learned trial judge had a great advantage, denied to this court, of seeing and hearing the witnesses and the appellant testify. Be that as it may, there is a wealth of authority for the proposition that upon an issue depending upon oral evidence where there is plainly perjury on the one side or the other, a Court of Appeal ought to be greatly influenced by the opinion of the trial judge, who has seen and heard the witnesses, except where he has failed to observe inconsistencies or to take account of material circumstances or probabilities. (See for example, *Khoo Sit Hoh & Ors v Lim Thean Tong* [1912] AC 323). An appellate court can, therefore, in appropriate cases, act upon its own view of the conflicting evidence. (See *Coghlan v Cumberland* [1898] 1 Ch 704 and *Bigsby v Dickinson* (1876) 4 Ch D 24).

In all the circumstances, having regard to the fact that the trial judge had overlooked or failed to take into account or given proper weight to, or drawn proper inferences from, the matters to which we have adverted, which otherwise might have caused him to come to a different conclusion, we were satisfied that he had not taken proper advantage of his having seen and heard the witnesses (per Lord Thankerton in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582) and so the present appeal came within the range of those cases where we were at liberty to act upon our own view of the conflicting evidence.

[124] Lord Roskill in *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165 (PC) at pp 168–69 had this to say in regard to appellate intervention:

Their Lordships do not find it surprising that the Court of Appeal not only felt obliged to reach the conclusion which they expressed orally at the conclusion of the hearing of the appeal that the learned judge's findings on the issue favourable to the appellant could not be supported, and that that court must reverse the learned judge's judgment and enter judgment for the respondents, but that in their written judgment they should have said that in basing his finding 'entirely on the credibility or otherwise of the witnesses testifying before him' the learned judge was guilty of 'a plain misdirection'. Their Lordships respectfully agree with the Court of Appeal that the findings favourable to the appellant were arrived at 'without an adequate scrutiny and consideration of all the evidence before him'.

Their Lordships are well aware, as no doubt were the Court of Appeal, of the limited circumstances in which it is open to an appellate court to reverse the findings of a trial judge based on credibility of the witnesses who have given evidence at the trial. But when a trial judge has so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and, in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him, it is the plain duty of an appellate court to intervene and correct the error lest otherwise that error result in serious injustice.

[125] DP Mohapatra J delivering the judgment of the Supreme Court of India in *State of Rajasthan v Hanuman* AIR 2001 SC 282 at p 284, aptly said:

No doubt the appellate court should assess the evidence on record with a view to satisfy itself that the appreciation of evidence by the trial court is not vitiated on account of any erroneous approach or illegality and it is not palpably erroneous. The

sustainability of the judgment depends on the soundness of the reasons given in support of the findings and the conclusion. A

[126] The non-consideration of the material evidence and the appreciation of the available evidence by the learned judge of the High Court was not objectively taken and was one sided. The learned judge of the High Court too failed to assess, weigh and for good reason either accept or reject the following evidence put forth by Zaharah bt A Kadir — the authorised representative of the deceased appellant: B

(a) The deceased appellant affirmed an affidavit on 26 January 1986 as seen at pp 180–187 of the appeal record at Vol 2. This affidavit was admitted as evidence pursuant to the order of the court dated 21 January 1989 as seen at pp 92–94 of the appeal record at Vol 1. The deceased appellant at paras 6, 6.1, 6.2, 6.3, 7, 8 and 9 of his affidavit refuted the contents of the letter dated 14 February 1952. For convenience, the deceased appellant's averments in his affidavit affirmed on 26 January 1986 will now be reproduced (see pp 185–187 of the appeal record at Vol 2): C D

> 6 do not recollect writing the letter 'YPG-2' annexed to End 21. I believe it is a spurious document and ought not be given any credence. It is not referred to in any other instrument as far as I know and it is incorrect in material particulars eg: E
>
> 6.1 The Agreement of 10 March 1951 referred to in the caption of the letter does not relate to the pieces of land described therein: that Agreement is in respect of the 6 pieces of land in the 1st Schedule annexed to the Statement of Claim while the letter refers to 41 pieces of land. F
>
> 6.2 The contents of the letter directly contradict the terms of the Agreements and the Powers of Attorney made on 10 March 1951 and 8 March 1952: those of 10th March 1951 were drawn up by Dato' Wong Shee Fun's Solicitors here and the Company's Singapore Solicitors. Annexed hereto marked 'AKA-4' and 'AKA-5' are photostat copies of the Agreement and the Power(s) of Attorney dated 10th March 1951 and marked 'AKA-6' and 'AKA-7' are the Agreement and the Power of Attorney dated 8th March 1952. G
>
> 6.3 A sum of $18,725.00 was paid to me vide the Agreement of 8th March 1952 but not for me to purchase the 41 pieces of land in the 2nd Schedule 'on behalf of the Company'. The money was part of the consideration paid to me for the right which I gave to the 1st Defendant to possess and mine the lands for bauxite. At no time was it envisaged that I was to transfer ownership of the lands to the 1st Defendant except to facilitate mining. Had the lands belonged to the 1st Defendant the Agreements and the Powers of Attorney would not have been necessary. H I
>
> 7 I respectfully contend that all the transfers of the several pieces of land in the 2nd Schedule to the 1st Defendant were made pursuant to the Agreement of 8th March 1952 for the expressed purpose of enabling the

1st Defendant to carry out mining operations therein. Now that mining operations have ceased that purpose is no longer operative and the lands ought to be returned to me.

8 I annex hereto marked 'AKA-8' a photostat copy of a Memorandum of Transfer made in respect of EMR No. 38. To the best of my recollection every transfer I made (is) in the same terms that is, each transfer was expressed to be 'in consideration of the Agreement of 8th March 1952.' I obtained the certified copy of the transfer upon payment of $125.00; I cannot afford to pay for copies of all the transfers I made and I offer this as a sample.

9 I therefore humbly pray that this Honourable Court would be pleased to dismiss the application in End 12 and grant my application in End 10 both with costs.

(b) The letter dated 14 February 1952 was produced by the learned judge of the High Court at p 36 of the appeal record at vol 1:

RAMUNIA BAUXITE LIMITED.

(INCORPORATED IN SINGAPORE)

HIGH STREET,

SINGAPORE.

TELEPHONE:

TELEGRAMS: RAMXITE SINGAPORE

14th February 1952

The Managing Director,

Ramunia Bauxite Ltd.,

Singapore.

Re: Land bought in Telok Ramunia by Messrs. Ramunia Bauxite Ltd., in the name of Abdul Kadir bin Ami for the purpose of mining Bauxite under an Agreement between Abdul Kadir bin Ami and other Directors of Ramunia Bauxite Ltd., dated 10.3.1951 — comprising of Lots 170, 168, 164, 128, 169, 167, 157, 161, 158, 162, 163, 144, 156, 140, 141, 148, 155, 143, 55, 150, 39, 149, 145, 154, 152, 136, 153, 139, *142,141,165,135, L.O. 33,134,138, A.O. 385,151,172,171,166,137*

I, Abdul Kadir bin Ami, a Director of Ramunia Bauxite Ltd., having purchased and registered in my own name certain bauxite bearing lands situated on Bukit Bopeng and Bukit Wakab Besar in Telok Ramunia comprising of lots as mentioned above, do hereby declare that these purchases have been made on behalf of the Company with the Company's funds, and are the properties of the Company (Ramunia Bauxite Ltd.).

I further accept the fact that these lands have been acquired for the express purpose of bauxite mining under the terms of an Agreement made between me and my fellow Directors, Messrs. Tow Keng Hee, Wong Shee Fun, Tow Siang Ling and Ng Yook Lin, dated 10.3.1951, whereby it is clearly stated that I shall be entitled a tribute of $2.00 per ton of bauxite mined and exported from this area. I also acknowledge that any tribute payable to the former landowners shall be my own responsibility and shall come from the said tribute of $2.00 per ton paid to me.

I hereby also acknowledge that it is my duty and responsibility the E.M.R.S are registered in my name and not in the name of the Co. to make applications for P.M.L.s in my own name on behalf of Ramunia Bauxite for renewals of such P.M.L.s when they expire.

It is also my intention to give to the Company (Ramunia Bauxite Ltd.) an irrevocable to exploit and work these lands and to make all applications for P.M.L.s or mining licences in respect of the above mentioned lands, and any other future acquisitions of bauxite bearing lands.

Yours faithfully,

Sgd. Abdul Kadir bin Ami

Director — Ramunia Bauxite Ltd.

and was considered by His Lordship without evaluating and analysing it with the contents of the affidavit affirmed by the deceased appellant on 26 January 1986 as reproduced earlier.

(c) It must be borne in mind that the miners did not affirm any affidavits to rebut and negate the contentions of the deceased appellant. At this juncture, it would be ideal to refer to a letter dated 8 January 1988 written by the first respondent to one of the miners by the name of Tow Siang Ling and in that letter the first respondent sought the assistance of Tow Siang Ling to render whatsoever assistance to the solicitors in regard to the dealings of the company with the deceased appellant. That letter can be seen at p 838 of the appeal record at Vol 6 and it was worded as follows:

8th January 1988

Mr Tow Siang Ling Charles

224 Loyang Avenue =03-01

Loyang Valley Singapore

1750

Dear Charles

We refer to your letter of 29th December 1987 on your resignation with immediate effect as a Director from the Board of the Company.

The Directors are concerned about the civil suits pending against the Company in which the plaintiffs have claimed ownership to several parcels of land which are or were registered in the name of the Company. It has also been alleged that

these parcels of land were formerly owned by them and transferred to the Company sometime in 1960 on the understanding that they would be re-transferred on the happening of certain specified events that have already taken place. As the present Directors are not aware of these purported transactions and since you are the only person who would be able to throw some light on the dealings of the Company during that time, the Directors would appreciate it if you could provide whatever assistance as and when you are required to do so by our solicitors in the defence of this action.

We take this opportunity to thank you for all your support to the Company during your term of office as a Director.

Yours faithfully

RAMUNIA BAUXITE PTE LTD

Sgd. Illegible

ANTHONY AUROL

Secretary.

(d) Despite the said letter, Tow Siang Ling remained silent. He did not affirm any affidavit to deny the deceased appellant's contention nor did he support the first respondent's contention that the purchases were made by the deceased appellant on behalf of the first respondent. To compound the matter further, the learned judge of the High Court failed to address his mind to the relevant inference to be drawn and the correct weight to be attached for the failure of Tow Siang Ling to affirm any affidavit in order to negate the deceased appellant's assertion. In this regard, it would be ideal to refer to the case of *Loke Yew v Port Swettenham Rubber Company, Limited* [1913] AC 491, a decision of the Privy Council. Lord Moulton delivering the judgment of the court had this to say at pp 503–504 of the report:

> Their Lordships therefore find that the formal transfer of all the rights under the original grant was obtained by the deliberate fraud of Mr Glass. He was aware that he could not obtain the execution of a transfer in that form otherwise than by fraudulently representing that there was no intention to use it until the plaintiff company were able so to do honestly by having acquired Loke Yew's subgrants by purchase, and he therefore fraudulently made such representation, and thereby obtained the execution of the transfer. It is an important fact to be borne in mind that although this fraud was clearly charged in the defence, Mr Glass was not called at the trial, nor was his absence accounted for. The inference to be drawn from this is obvious and is entitled to great weight.

(e) Now, the amended statement of claim at paras 14–14.4 as reproduced earlier itemised the particulars of fraud perpetrated by the first respondent. But, the miner concerned — referring to Tow Siang Ling, who had sold and transferred the first respondent's company together

with the 41 pieces of land to the second respondent had failed to come forward to affirm any affidavit to deny the deceased appellant's claim.

[127] Yeow Peck Guen, the administrative executive of the second respondent, affirmed an affidavit on 22 March 1986 as seen at pp 188–191 of the appeal record at Vol 2. And at para 3 of the affidavit, this was what Yeow Peck Guen deposed to:

> 3 On 15th November, 1954 the 1st Defendant (referring to the first respondent) wrote a letter to the Commissioner of Lands and Mines, Johore explaining the role of the plaintiff (referring to the deceased appellant) in the acquisition of the lands from the original landowners. A copy of the said letter is annexed hereto and marked (as) exhibit «P1.

[128] Exhibit P1 can be seen at pp 390–393 of the appeal record at Vol 3 and it was written by Tow Siang Ling and it was worded in this way:

> 15th November 1954
>
> The Commissioner of Lands and Mines, Johore,
>
> Government Building, Johore Bahru.
>
> Dear Sir,
>
> Sub: Your Letter No. 86 in CLM/267/50
>
> Reference to Application for P.M.Ls.
>
> We thank you for the above letter of 23rd October, in connection with which the writer has had a general discussion at your office on Tuesday the 9th of November.
>
> As advised by you verbally and in order that you may be acquainted with all the facts in relation to our arrangemente with the Ramunia landowners we are pleased to give the following account outlining the history of the company's land acquisitions at Telok Ramunia.
>
> With the help of Abdul Kadir bin Ami as an intermediary we acquired by agreements, various lands at Telok Ramunia which, whenever practicable, were transferred to Abdul Kadir bin Ami who, in the capacity of a representative of our company, signed these agreements with the landowners. These agreements entitle the respective landowners to a collective tribute of $1/- per ton payable direct by the company, pro rata, in accordance with the respective areas of their individual land holdings. Clause (b) of this agreement provides that each landowner shall obtain his share of the tribute direct from the company, and that he may apply to the company for a certificate indicating the exact proportion of the $1/- tribute to which he is entitled. This certificate further confirms the company's direct responsibility in the payment of this tribute and provides on pages 2 and 3 thereof, a complete schedule of those entitled to this tribute, thereby binding the company to this liability.
>
> We enclose for your inspection a specimen of the above said agreement and also a specimen of the tribute certificate.

There were a few instances where a landowner signified his intention to sell his land outright to the company, and in such a case the land was purchased for a lump sum, the company thereby becoming entitled to the share of the tribute payable in respect of the particular lot of land.

When the company finally commenced shipping ore from the mine, tribute was paid to all who were included in the schedule printed on the tribute certificate, even though the major part of the lands were still not yet transferred to Abdul Kadir bin Ami or to the company. However we made clear to all the landowners our intention to have all the lands transferred as soon as it became practicable, and we took the initiative by doing everything possible in our power to help them apply for L.A. and making small advances to help them cover their travelling expenses etc. The necessity of transferring these lands in preparation for eventual conversion was explained in conjunction with the fact that since the grades of ore from separate areas were not constant and as a certain standard quality was demanded by our customers abroad, it was imperative that we made available for mining all the lands at our disposal so that the widest possible scope can be provided to facilitate our ore-blending-operations. That unnecessary wastage of prime ore which may be shipped in order to build up required quantities and loss of low grade ore which may be used for blending with prime ore to produce a standard salable quality might result from delay in effecting the conversion of these lands was common knowledge to all the landowners.

By the middle of 1953, as a result of all our efforts, the bulk of the lands were transferred to Kadir or to the company. There were however, some lots that were in the names of deceased owners, which were deadlocked due to non cooperation of beneficiaries in the matters of obtaining L.A. and or Distribution Orders, or due to internal strife amongst the beneficiaries themselves.

With the object of prompting these landowners to full cooperation, it was decided that their shares of the tribute in respect of the lots in question should be temporarily held back until transfers were completed.

Since this step was taken some of these landowners have given us full cooperation with the result that their lands have now been transferred and the respective suspense tributes fully paid up.

The rest of these landowners seem to be completely indifferent although they have wasted no time in complaining of not having received their shares of the tribute.

The lots included in our present application for Proprietory Mining licences are examples of recent transfers which would not have taken place had we not taken this drastic step.

In reply to paragraph 2 of your letter of the 23rd of October, we give the following explanation:

Whereas Abdul Kadir bin Ami originally held lands on behalf of the company, the company on becoming more organised gradually dealt direct with the government as well as with the Ramunia landowners, so much so that it became desirable, both from the point of streamlining all land matters and also for the purpose of sorting out all the various and complex aspects of land problems, to have all lands transferred and all leases issued direct to the company. Subsequent transfers of lands were then made direct to the company.

However, this did not in fact create two different categories as is suggested because, all lands, whether in the name of Abdul Kadir bin Ami or in the name of the company, have been strictly speaking the properties of the company, Kadir having in the former instance only held the lands in trust for the company, and as they were all subject to the payment of tribute in accordance with the schedule printed on pages 2 and 3 of the afore-mentioned tribute certificate.

In compliance with your verbal request, we attach hereto, an account showing particulars of tributes held up.

We thank you for your very kind interest in this matter and trust that you will let us hear from you soon.

Yours faithfully,

RAMUNIA BAUXITE LTD.

Sgd. Illegible

(Tow Siang Ling)

Director Ramunia Bauxite Ltd.

Singapore.

PARTICULARS OF TRIBUTE TEMPORARILY HELD BACK BY COMPANY.

1.	Syed Abdul Ghani Bin Mohd.		Lot. 132 E. 118
	204,119 tons	=	$4.857.05
2.	Syed Ismail Bin Mandak		Lot. 153 E. 34
	204,119 tons	=	$1.620.76
3.	Syed Ismail Bin Mandak 3/5 of		Lot. 156 E. 41
	204,119 tons	=	$2.455.98

RAMUNIA BAUXITE LTD. Sgd.

Illegible (Tow Siang Ling)

Director Ramunia Bauxite Ltd.

Singapore.

[129] But what Tow Siang Ling wrote in exh P1 dated 15 January 1954 should not be given any weight for the following reasons:

(a) Tow Siang Ling had failed to come forward by filing any affidavit and his credibility as the author of exh P1 is at stake;

(b) exh P1 was written by Tow Siang Ling after the deceased appellant had resigned as the director of the first respondent company in October 1954 after a dispute; and

(c) exh P1 is nothing more than a unilateral expression of the facts by Tow Siang Ling.

[130] It is germane, at this juncture, to refer to the minutes of the meeting with the landowners held on 14 December 1952 as seen at pp 375–376 of the appeal record at Vol 3. The minutes of that meeting contained the following interesting facts that merit reproduction:

> PRESENT:
> District Officer, Kota Tinggi.
> Collector of Land Revenue, Kota Tinggi.
> Mr. W.A. Conrad, Managing Director E.Ott Co. Ltd.
> Mr. Toh Siang Ling. do-
> Che Abdul Kadir bin Ami.
> -do-Asst. District Officer, Pengerang.
>
> THE FOLLOWING 'LAND-OWNERS' WERE ALSO PRESENT:-
>
> Syed Abdul Rahman bin Mohamed.
>
> Tabob bin Daud.
>
> Syed Ahmad bin Ismail.
>
> Jemah binti Kamran.
>
> Abdul Rahman bin Asmah.
>
> Syed Omar bin Yahya.
>
> Sibolo binti Palatateh.
>
> Ismail bin Ariffin.
>
> Hussein bin Hassan.
>
> Osman bin Asmah.
>
> Syed Abdul Ghani bin Mohamed.
>
> Syed Ibrahim bin Abdullah.
>
> Salleh bin Malik. Syed Abdul
>
> Kadir bin Mansor. Munah binti
>
> Abdullah. Mohamed Said bin Ali
>
> Syed Mashor bin Ja'afar. Syed
>
> Abdul Ghani bin Moh. Syed Ali bin Hassan. Jamhil bin Zahib.
>
> Mohamed Salleh bin Malik. Syed Ismail bin Ali.
>
> Apart from Mohamed Salleh bin Malik and Syed Ismail bin Ali, all the 'Land-owners' present had received signed Agreements from Che Abdul Kadir bin Ami, a Director of Ramunia Bauxite Limited.
>
> Mr. Toh Siang Ling explained that these two persons had originally entered into agreement with Madam Quek Jit Poon but in view of the agreement now executed between the Company and Madam Quek a further Agreement will be executed with them to replace the temporary Agreement already in their possession.

2. All the 'Land-owners' admitted having received compensation of $100/- per acre in accordance with Clause I of the Agreement. Further, they all stated they were conversant with Clause I (a) to the effect that the 'Land-owners' shall receive tribute collectively at the rate of $1/- per long ton.

3. Certain of the 'Land-owners' stated they have received interest free loans to the extent of a few hundred dollars against the tribute to be paid at some future date.

4. Certain of the 'Land-owners' enquired when they could expect the 1st payment of tribute. Mr. Conrad explained that the first shipment was now being loaded and five days after sailing he would be in a position to make the first payment. He hoped that the first shipment would be in the region of 6,200 tons and during 1953 he hoped to ship not less than 153,000 tons. The Agreement, however, states the Tribute shall be paid within fourteen days of the shipment sailing.

5. The question of compensation and tribute for those 'Land-owners' not included in the existing printed Agreement was raised by the Collector of Land Revenue, Kota Tinggi who pointed out that certain 'Land-owners' had sold their property to Che Abdul Kadir bin Ami during the first half of 1951 and are not included in the Agreement. Mr. Conrad explained it is the intention of the Mining Company to see that these people are no worse off, in virtue of having transferred their land, than those whose land is still registered in their names and who are included in the Agreement.

6. The Collector of Land Revenue, Kota Tinggi also raised the question of the future ownership of the mining land upon completion of mining operations. Mr. Conrad said that if the former owners expressed a desire for the return of their land the necessary transfers would be executed.

7. At this stage in the Meeting Messrs. Conrad, Schwander and Toh Siang Ling withdrew from the Meeting.

8. The District Officer, Kota Tinggi then went on to explain in detail the Clause relating to the payment of Tribute, after which the 'Land-owners' present stated that they understood the basis on which tribute will be paid, and expressed satisfaction with the Agreement as executed.

Sgd. Illegible

(B.H. CATCHPOLE MCS)

COLLECTOR OF LAND REVENUE,

KOTA TINGGI.

Ref: CLRKT. 385/49/85.

14 December, 1952.

* Note:- Admission on lands sold to Abdul Kadir.

[131] It must be acknowledged that the contents of the minutes of that meeting showed the failure on the part of Tow Siang Ling who was present at

that meeting to deny the Kota Tinggi Collector of Land Revenue's assertion that certain landowners had sold their lands to the deceased appellant during the first half of 1951.

[132] The contents of the minutes of that meeting showed the further admission by the managing director in the person of Mr Conrad who upon the Kota Tinggi collector of land revenue's query as to the future ownership of the mining lands upon completion of the mining operations had asserted that those lands will be transferred back to the landowners should they express such desire upon completion of the mining operations. This damning fact cannot be ignored. It showed cogency to the deceased appellant's contentions that the transfer of the said lands were merely to facilitate the mining operations and not as an outright transfer as contended by the respondents.

[133] The respondents' trial submissions before the learned judge of the High Court can be seen at pp 235–258 of the appeal record at Vol 2. At p 246 of the appeal record at Vol 2, the respondents submitted at para 3.1(d) that, 'the indication of a return of the lands was in favour of the former owners and not to the plaintiff (referring to the deceased appellant)'. This salient fact was not even considered by the learned judge of the High Court. His Lordship failed to consider that the 'former owners' were indeed the owners whom at the date of the meeting on 14 December 1952 had transferred their lands to the first respondent not as an outright transfer but rather to facilitate the mining operations.

[134] It is necessary that the learned judge of the High Court evaluate the above salient piece of evidence put forward by the deceased appellant. Yet this was not done. And to compound the matter further there was a failure to categorically state that the version of the facts advanced by the deceased appellant was rejected by His Lordship.

[135] Insufficient judicial appreciation of the evidence placed before the learned judge of the High Court would attract appellate intervention. And the judicial determination of a dispute where substantial questions of mixed fact and law are involved can only be satisfactorily reached if it is supported by strong cogent reasons. Here, the situation is entirely the opposite. The learned judge of the High Court had not directed his mind in a judicial manner in approaching the case. His Lordship failed to examine the available evidence in detail nor did he state in his judgment that the deceased appellant's evidence was not acceptable. His Lordship seemed to have taken an easy way out by merely drawing an inference from one aspect of the case.

[136] It is ideal, at this juncture, to refer to the judgment of Raja Azlan Shah

FJ (as His Royal Highness then was) in the case of *Tan Kim Leng & Anor v Chong Boon Eng & Anor* [1974] 2 MLJ 151 (FC). This was what his Royal Highness said:

> In reaching a conclusion the learned judge had to consider the probabilities and the circumstances of the whole case. It was essentially a case in which there should have been a full record of the reasons which persuaded him to reach the conclusion he did. A mere finding of no negligence against both the respondents and that the accident occurred because of the sudden brake failure on account of some latent defect in the braking system, not supported by reasons, is not a judgment according to law.
>
> A judicial determination of a dispute where substantial questions of mixed fact and law arise is satisfactorily reached only if it be supported by the most cogent reasons that commend themselves to the learned judge. Recording of reasons in support of a decision of a dispute serves more purposes than one. It is intended to ensure that the decision is not the result of whim or fancy. 'It is of course true', said Sir Alfred Denning (as he then was), 'that his decision may be correct even though he should give no reason for it or even give a wrong reason: but, in order that a trial should be fair, it is necessary, not only that a correct decision should be reached, but also that it should be seen to be based on reason; and that can only be seen, if the judge himself states his reasons'. See *The Road to Justice*, p 29.
>
> A party to the dispute is ordinarily entitled to know the grounds on which the learned judge has decided against him, and more so, when the judgment is subject to appeal. An appellate court will then have adequate material on which it may determine whether the facts are properly ascertained, the law has been correctly applied and the resultant decision is just.
>
> In my opinion the finding of the learned judge in the instant case is not a judgment according to law.

[137] It is now appropriate to refer to para 8 of the memorandum of appeal which reads as follows (see p 8 of the appeal record at Vol 1):

> 8 The Learned Judge had erred on the law in failing to appreciate the canons of constructions in construing the Agreements transacted by the deceased appellant:
>
> 8.1 By reason stated at paragraph 8 above, the Learned Judge had erred on the law and on the facts in arriving at his findings that the 3 preambles in the 1952 Agreement establish the fact (that) the lands were purchased for and on behalf of the 1st Defendant.

[138] The canons of construction are not rules of law. They are mere guidelines to interpret the English language (*Investors Compensation Scheme Ltd v West Bromwich Building Society, Same v Hopkin & Sons (A Firm) and others* [1998] 1 WLR 896 (HL)). What Lord Diplock said in *Prestcold (Central) Ltd v Minister of Labour* [1969] 1 WLR 89 at pp 96–97 (CA), merits reproduction. There His Lordship said that:

> … many of them are general rules of composition which any writer seeking clarity of expression is likely to follow, such as expressio unius exclusio alterius, ejusdem generis and noscitur a sociis though, unlike lawyers, he does not express them in the arcane obscurity of the Latin tongue.

[139] Devlin J in the same vein in *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240 at p 244, aptly said that:

> A rule of construction cannot be more than a guide to enable the court to arrive at the true meaning of the parties. The ejusdem generis rule means that there is implied into the language which the parties have used words of restriction which are not there. It cannot be right to approach a document with the presumption that there should be such an implication. To apply the rule automatically in that way would be to make it the master and not the servant of the purpose for which it was designed — namely, to ascertain the meaning of the parties from the words they have used.

[140] Again, in regard to the ejusdem generis principle, Bowen LJ had this to say in *The Earl of Jersey v The Guardians of the Poor of the Neath Poor Law Union acting as the Neath Union Rural Sanitary Authority* (1889) 22 QBD 555 at pp 561–562 (CA):

> It is to be observed that the rule admits, as every rule of construction of documents must admit, as it is after all but a working canon to enable us to arrive at the meaning of the particular document — it admits of being modified by the contents of the document itself, and there are many classes of cases in which it is obvious that the rule would have to bend.

[141] On the importance of recitals as an aid to construction, the Court of Appeal's case of *Ex Parte Dawes, In re Moon* (1886) 17 QBD 275 should be referred to. There Lord Esher MR said at p 286:

> This is a deed of assignment or conveyance of property by way of security, and the question is how it is to be construed.

[142] Further down the same page, Lord Esher MR had this to say:

> Now there are three rules applicable to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred.

[143] In *Square Mile Partnership Ltd v Fitzmaurice McCall Ltd* [2007] 2 BCLC 23 (CA), Arden LJ aptly said:

> Unusually, the operative parte of the agreement provide for indebtedness to be discharged and transfers made before completion (see cll 4.3, 6.3 and 14.2). Normally an agreement contains steps to be taken under the agreement and not in preparation for it. Steps taken in preparation for an agreement are usually referred to in the recitals to an agreement if they are referred to at all. Recitals of this kind can be useful for interpreting the agreement.

[144] Now, the respondents through their sole witness Khoo Gim Hoon ('DW1') referred to the recitals of the agreement dated 8 March 1952 (see pp 293–297 of the appeal record at Vol 3). The recitals read as follows:

> WHEREAS the Proprietor is the registered proprietor, owner or occupant of the lands described in the Schedule hereto (hereinafter referred to as the 'said lands').
>
> AND WHEREAS the Miners have from time to time advanced various sums of money to the Proprietor amounting to Dollars Eighteen thousand seven hundred and twenty-five ($18,725.-) for the purchase of the said lands in the name of the Proprietor.
>
> AND WHEREAS the said lands have been purchased in the name of the Proprietor for and on behalf of the Miners (as the Proprietor hereby acknowledges).
>
> AND WHEREAS the said lands have been acquired for the express purpose of enabling the Miners to prospect and mine for bauxite and aluminium ores or any other mineral ores on the terms and conditions hereinafter contained.

[145] It was submitted that at the trial, the deceased appellant did not submit in regard to the recitals. According to the respondents, the recitals are clear and unambiguous and there was very little that the learned judge of the High Court could do except to give effect to their plain meaning. Thus, it was submitted for the respondents that the learned judge of the High Court did not fall into an error, be it legally or factually.

[146] But where the words of the operative parts of the agreement dated 8 March 1952 are clear they will not be controlled, cut down, curtailed or qualified by the recitals. Patteson J in *Walsh v Trevanion* (1850) 15 QB 733 at p 751, aptly said that:

> … when the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed. On the other hand, when those words are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of those words.

[147] Sir John Romilly MR in *Holliday v Overton* (1852) 14 Beav 467 at p 470, echoed the same sentiments:

A … it is impossible by a recital to cut down the plain effect of the operative part of a deed.

[148] Lord Davey in *Mackenzie and others v The Duke of Devonshire and others* [1896] AC 400 at p 408 (HL), succinctly said:

B

> I take it to be a settled principle of law that the operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down, or qualified by a recital or narrative of intention.

C

[149] It was submitted on behalf of the deceased appellant that a document must be construed as a whole and that the construction which is consistent with the whole is preferred. It was also emphasised that no part can be read in isolation.

D

[150] It is acknowledged that in order to arrive at the true interpretation of a document, no clause must be considered in isolation. Instead it must be considered in the context of the whole of the document. Indeed this is the approach adopted by Lord Watson in *Chamber Colliery Company, Limited v* E *Twyerould* [1915] 1 Ch 268 (HL). There His Lordship said at p 272:

> I find nothing in this case to oust the application of the well known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no F violence to the meaning of which they are naturally susceptible.

[151] This is a holistic approach and it has received the stamp of approval by Neuberger LJ in *Shrewsbury v Adam* [2006] 1 P & CR 27 (CA), and in *Taylor* G *v Rive Droite Music Ltd* [2006] EMLR 4 (CA). It has also been approved by Arden LJ in *Shaw v Hutton-Shaw* [2007] 1 FLR 1839 (CA).

[152] Waller LJ in *A Meredith Jones & Co Ltd v Vangemar Shipping Co Ltd (The 'Apostolis') (No 2)* [2000] 2 Lloyd's Rep 337 at p 348 (CA), aptly said:

H

> However, it is hornbook law that a contract must be construed as a whole. One cannot first interpret cl 3 and then afterwards alter the meaning of cl 20 in order to accord with it.

I **[153]** It cannot be denied that the relationship between the recitals and the operative parts of the agreement dated 8 March 1952 must be viewed in its correct perspective. The recitals in the agreement dated 8 March 1952 are ambiguous in regard to the status of the proprietor — the deceased appellant. Whereas the operative parts of cll 1–18 of the agreement dated 8 March 1952

are consistent with the deceased appellant's status as the proprietor of the lands described in the Schedule while the miners, on the other hand, are merely pursuing the mining operations. Clause 15 of the agreement dated 8 March 1952 reads as follows (see p 296 of the appeal record at Vol 3):

> 15 It is hereby expressly agreed between the parties hereto that the terms of this agreement shall also apply in all respects to any future renewal or renewals of the said Proprietory Mining licences and to any mining lease or leases for which the said Proprietory Mining licences may be exchanged and to any future and other applications for Proprietory Mining licence or licences or mining leases to be granted to the Proprietor in respect of any other lands in Telok Ramunia for mining bauxite and aluminium ores or any other ores without any further consideration apart from the consideration herein mentioned except that all expenses and costs incurred by the Proprietor in applying for and acquiring such future and other Proprietory Mining licence or licences and mining leases shall be borne by the Miners.

[154] Reading cl 15 of the agreement dated 8 March 1952 in its proper context, it reiterates the intention of the parties as reflected in the agreement dated 10 March 1951 as seen at pp 287–292 of the appeal record at Vol 3. Thus, the operative parts of the agreement dated 8 March 1952 must prevail over the recitals.

[155] Learned counsel for the deceased appellant rightly submitted that every provision of the agreements dated 10 March 1951 and 8 March 1952 must be read in order to gather the intention of both parties. This approach received the approvals of the Federal Court in *Woo Yew Chee v Yong Yong Hoo* [1979] 1 MLJ 131, and of the Supreme Court in *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405, and of the Federal Court in *Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp* [1995] 1 MLJ 401. And way back in 1957, it also received its stamp of approval of the English Court of Appeal in *Addiscombe Garden Estates, Ltd and another v Crabbe and others* [1957] 3 All ER 563.

[156] In *Woo Yew Chee v Yong Yong Hoo*, Raja Azlan Shah Ag CJ (Malaya) (as His Majesty then was) aptly said at p 133:

> I now turn to the crux of the matter: was the transaction a licence or a tenancy? What is the test to be applied? It is now well known that the law will always look beyond the terminology of the agreement to the actual facts of the situation.

[157] In *Malayan Banking Bhd v PK Rajamani*, in allowing the appeal, Mohamed Dzaiddin SCJ speaking for the Supreme Court had this to say (see the headnotes at pp 405–406):

(1) The trial judge had taken the wrong approach in arriving at his conclusion. The

correct approach would be to look at the substance, not just the label which had been attached to the letter. The law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance.

[158] In *Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp*, Lamin FCJ said at p 411 of the report:

> To gather the true intention of parties in a contract or an agreement, every provision of the agreement must be examined.

[159] In *Addiscombe Garden Estates, Ltd and another v Crabbe and others*, Jenkins LJ writing separately for the Court of Appeal said at p 565 of the report:

> The first question is whether the so called licence of 12 April 1954, in fact amounted to a tenancy agreement under which the premises were let to the club trustees. The principles applicable in resolving a question of this sort are, I apprehend, these. It does not necessarily follow that a document described as a licence is, merely on that account, to be regarded as amounting only to a licence in law. The whole of the document must be looked at; and if, after it has been examined, the right conclusion appears to be that, whatever label may have been attached to it, it in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant, and on the grantor in substance the rights and obligations of a landlord, then it must be given the appropriate effect, that is to say, it must be treated as a tenancy agreement as distinct from a mere licence.

[160] Continuing at p 567 of the report, Jenkins LJ had this to say:

> That is the whole of the document. First, one must observe that it is described by the parties as a licence. Secondly, one must observe that the draftsman has studiously and successfully avoided the use either of the word 'landlord' or the word 'tenant' throughout the document. The nearest to the use of the word 'tenant' is the reference to 'tenantable repair' in cl 4, sub-cl (HI); so that if the question depended on the label attached to the document, one would be constrained to say that this, in accordance with its label, was a licence. If, however, it is right (as I have no doubt it is) to look at the substance of the matter, I think that a different conclusion inevitably ensues.
>
> I might mention, as regards the character of the premises, that we have been supplied with an agreed plan which shows that, although the whole of the premises are not completely enclosed, as it were, in a ring fence, the greater part of them appear to occupy a particular enclave in the extensive grounds of the Shirley Park Hotel, though there are two outlying rectangular portions, one, I think, consisting of tennis courts, and the other containing some other appurtenances. There is nothing in the character of the premises as shown on the plan to make them an unfit subject of a tenancy agreement as distinct from a licence.

[161] Applying all these salient authorities to the present appeal at hand, it is ideal to examine all the relevant documents transacted by the deceased appellant during his life time in order to gather the true intention of the parties.

[162] The agreement dated 10 November 1950 between the 18 landowners and the deceased appellant as seen at pp 284–286 of the appeal record at Vol 3 will now be examined:

(a) The deceased appellant purchased the nine lots, namely Lot Nos 159, 160, 230, 175, 176, 177, 178, 180, and 118 directly from the original landowners.

(b) The deceased appellant paid the purchase price for the nine lots. And the nine lots were renumbered as eight lots as reflected at the First Schedule to the amended writ and the statement of claim. This is supported by the official assignee's report dated 6 January 1959 as seen at pp 278–283 of the appeal record at Vol 3.

(c) The deceased appellant became the registered owner of the eight lots as reflected in the official assignee's report at p 279 of the appeal record at Vol 3 of para 5. That para 5 was worded in this way:

> 5 On the 10th day of November 1950, the bankrupt entered into an agreement with one Abdul Ghani bin Mohamed and 17 others who were described as land-owners whereby on payment of a sum of $3,500.00 by the bankrupt to the said land-owners they transferred their nine pieces of mining lands to the bankrupt. A further condition in the said agreement was that the bankrupt should pay a tribute of $1.00 per ton of bauxite removed from the lands to the owners. The said (9) nine pieces of mining lands have since been re-numbered as (8) eight pieces which are listed at para 3 above. The said agreement dated 10th November 1950 is annexed hereto marked 'O.A.1'.

(d) The deceased appellant applied for proprietary mining licence in his own name and was issued the said licence on 27 January 1951 as evidenced at the recital to the agreement dated 10 March 1951 at pp 287–292 of the appeal record at Vol 3.

[163] The agreement dated 10 March 1951 entered by the deceased appellant with the four miners, namely, Wong Shee Fun, Tow Keng Hee, Tow Siang Ling and Ng Yook Lin as seen at pp 287–292 of the appeal record at Vol 3 will now be examined:

(a) The deceased appellant entered the said agreement as the proprietor with four persons, namely, Wong Shee Fun, Tow Keng Hee, Tow Siang Ling and Ng Yook Lin who are miners.

(b) The deceased appellant succeeded in obtaining proprietary mining

licences over the eight lots which will, from time to time, be renewed for successive terms of two years throughout the period of 21 years beginning from 27 January 1951.

(c) The deceased appellant allowed the four miners to enter into possession of the eight lots and carry out the mining operations for a consideration of RM20,000 where only the sum of RM10,000 was duly paid and received by the deceased appellant as acknowledged in the said agreement.

(d) Clauses 5 and 6 of the said agreement retained the deceased appellant's proprietary interests in the eight lots, namely:

(i) the right to be indemnified by the four miners for breach of the four miners' obligations to exercise due care and skill in carrying out the mining operations; and

(ii) the right of entry to inspect the eight lots and the right to inspect the books of accounts of the ores produced from the eight lots.

(e) Clause 8 of the said agreement states that the deposit of the titles to the eight lots with the four miners are for the sole purpose of ensuring that during the continuance of the said agreement the deceased appellant shall not encumber the said lands and that the said deposit is not an outright intention to transfer the said lands to the four miners.

(f) Clause 11 of the said agreement confirms that the purpose of forming the first respondent — Ramunia Bauxite Pte Ltd, is to work the said lands under the proprietary mining licences as well as any future proprietary mining licences which may be issued to the deceased appellant.

(g) Clause 13 of the said agreement reflects the intention of the parties on future dealings and it unequivocally confirms the following state of affairs:

(i) The agreement between the deceased appellant and the four miners that the terms of the said agreement shall apply in all respects to any future renewals of the proprietary mining licences and to other applications for proprietary mining licences to be granted to the deceased appellant in respect of any other lands.

(ii) That the consideration in the said agreement shall carry forth for all future agreements in respect of other lands.

(iii) That all expenses and costs incurred by the deceased appellant in applying for and acquiring such future proprietary mining licences shall be borne by the four miners.

(h) Clause 14 of the said agreement fully supports the deceased appellant consistent contentions that the deposit of the titles to the four miners are

meant to facilitate the mining operations and not as an outright transfer of the deceased appellant's proprietary interests.

[164] The agreement dated 8 March 1952 entered by the deceased appellant with the first respondent — Ramunia Bauxite Pte Ltd, as seen at pp 293–297 of the appeal record at Vol 3 will now be examined:

(a) The deceased appellant entered the said agreement as the proprietor with the first respondent described as the miners.

(b) The status of the parties in the said agreement are consistent with the agreement dated 10 March 1951.

(c) Upon perusal of the four recitals found in the said agreement, the following facts can readily be discerned:

(i) The deceased appellant is the proprietor of the lands listed in the Second Schedule to the amended writ and the statement of claim.

(ii) That various sums of monies were advanced by the miners to the deceased appellant as agreed by both parties in the agreement dated 10 March 1951 at cl 13 thereto. This is consistent with cl 1 of the said agreement where 'various sums of monies' amounting to RM18,725 is classified as the consideration paid by the miners and accepted by the proprietor so as to allow the miners to enter into possession of the said lands and not to be construed as the purchase price as contended by the respondents.

(iii) That the lands listed in the Second Schedule to the amended writ and the statement of claim were purchased in the name of the deceased appellant as the proprietor.

(d) Clauses 7 and 8 of the said agreement retained the deceased appellant's proprietary rights to the said lands which included, inter alia, the deceased appellant's right to be indemnified and the deceased appellant's right to enter and inspect the said lands as well as the right to inspect the books in order to account for the ores produced.

(e) Clause 10 of the said agreement reiterates the position where the deposit of the titles to the said lands with the miners are for the sole purpose of ensuring that during the continuance of the said agreement the deceased appellant shall not sell, charge or in any way encumber the said lands and that the said deposit is not an outright intention to transfer the said lands to the miners.

(f) Clause 16 of the said agreement again supports and substantiates the deceased appellant's consistent contentions that the deposit of the titles

to the miners are merely to facilitate the mining operations and cannot be construed as an outright transfer of the deceased appellant's proprietary interests.

(g) And the deceased appellant's responsibility as the proprietor to pay the necessary tributes to the original landowners lends credence to the deceased appellant's proprietary rights.

[165] Both the agreements dated 10 March 1951 and 8 March 1952 made reference to tributes to be paid to the deceased appellant as the proprietor. Abdul Aziz J in *Virutthasalam & Ors v Phang Quee* [1965] 1 MLJ 133 rightly approved Lord Cairns definition of a mining lease in *Gowan v Christie* (1873) LR 2 SC App 273. At p 133 of the report, this was what Abdul Aziz J said:

> Lord Cairns in *Gowan v Christie* (1873) LR 2 SC App 273 said of a mining lease:
>
> > What we call a mining lease is really, when properly considered, a sale out and out of a portion of land. It is the liberty given to a particular individual for a specific length of time to go into and under the land and to get certain things there if he can find them, and to take them away just as if he had bought so much of the soil.

A tribute can therefore be fairly described as the purchase price of the soil that the miner removes from the land.

[166] The tributes to be paid under both the agreements dated 10 March 1951 and 8 March 1952 lend credence to the deceased appellant's consistent assertions that upon cessation of the mining operations reversionary rights would be activated in favour of the landowners. The assertion by the deceased appellant finds support in the letter marked as exh P1 as reproduced earlier and it would be ideal to reproduce, once again, para 5 only:

> There were a few instances where a landowner signified his intention to sell his land outright to the company and in such a case the land was purchased for a lump sum the company thereby becoming entitled to the share of the tribute payable in respect of the particular lot of land.

[167] The agreement dated 10 March 1951 contained 16 clauses. While the agreement dated 8 March 1952 contained 18 clauses. A perusal of each and every clause in both the agreements would indicate that the agreement dated 8 March 1952 is in pari materia with the agreement dated 10 March 1951. That this is so is further confirmed by the way in which cl 13 of the agreement dated 10 March 1951 was drafted. That cl 13 of the agreement dated 10 March 1951 encapsulated the intention of the parties in regard to the future dealings to facilitate the mining operations by depositing the land titles to the four miners which cannot be construed as an outright transfer of the deceased appellant's proprietary interests.

[168] In arriving at a finding that the deceased appellant merely held the 29 pieces of land on trust for the first respondent, the learned judge of the High Court failed to consider the following germane and relevant considerations, namely:

(a) Recital 4 of the agreement dated 8 March 1952 expressly states that the purpose of the acquisition is to enable the miners to prospect and mine the bauxite and aluminium ores or any other mineral ores.

(b) Clause 10 of the agreement dated 8 March 1952 requires the deceased appellant as the proprietor to give an undertaking not to sell, charge or in any way encumber the said lands.

(c) The power of attorney dated 8 March 1952 as seen at pp 383–387 of the appeal record at Vol 3 impinges on the miners in that it does not give the miners the power of sale and it limits the power of attorney for the duration of the term of the proprietary mining licences.

[169] Reference to the memorandum of transfer executed by the deceased appellant at pp 388–389 of the appeal record at Vol 3 will now be made. Now, the deceased appellant executed the memorandum of transfer of lands in favour of the first respondent in consideration of the agreement dated 8 March 1952. It must be emphasised that the 'monies portion' in the memorandum of transfer has been deleted. And this has also been confirmed by the deceased appellant in his affidavit affirmed on 26 January 1986 as seen at pp 180–187 of the appeal record at Vol 2 particularly at paras 7 and 8 which have been reproduced earlier. Briefly, in paras 7 and 8 of his affidavit affirmed on 26 January 1986, the deceased appellant averred that all the transfers of the several pieces of land in the Second Schedule to the amended writ and the statement of claim were made pursuant to the agreement dated 8 March 1952 for the expressed purpose of enabling the first respondent to carry out the mining operations. The averments by the deceased appellant in paras 7 and 8 of the affidavit affirmed on 26 January 1986 were not rebutted nor negated by the first respondent. It must also be emphasised that one of the signatories to the agreement dated 10 March 1951 was Tow Siang Ling and he too resigned as a director of the first respondent on 29 December 1987 as reflected at p 836 of the appeal record at Vol 6 without affirming an affidavit to counter the averments of the deceased appellant's affidavit.

[170] There were two powers of attorney executed by the deceased appellant on 10 March 1951 as seen at pp 377–382 of the appeal record at Vol 3 and on 8 March 1952 as seen at pp 383–387 of the same record of appeal. In these two powers of attorney, consistent expressions on the status of the parties and the intents and purposes of the parties are clearly stated therein.

[171] The status of the deceased appellant as the proprietor of the lands

A listed in the First and Second Schedules to the amended writ and the statement of claim are also reflected in the two powers of attorney. Likewise the first respondent's status as miners are consistently mentioned in the two powers of attorney.

B **[172]** The objects of both the powers of attorney are expressly stated to be for the better securing to the first respondent the proper carrying and conduct of the mining works on the said lands or other lands under the proprietary mining licences and mining leases which may be issued to the deceased appellant.

C **[173]** The last clauses in both the powers of attorney expressly stipulated that the powers are only for the duration of the proprietary mining licences. This restrictive power adds credence to the contentions of the deceased appellant that, at all material times, the instruments executed by the deceased appellant did not intend to divest the interest and title in the said lands but rather it was
D merely to facilitate the mining operations.

[174] Under both the powers of attorney, the miners do not have any power of sale. If as contended by the respondents that both the agreements dated 10
E March 1951 and 8 March 1952 are outright purchases of said lands and that the deceased appellant is merely a bare trustee just like what the learned judge of the High Court held then the question to ask is: why pay tributes if it is an outright sale? And why is there a need to pay tributes to the other people after the deceased appellant had been declared a bankrupt if the respondents are the
F original land owners? These pertinent questions naturally flow from the factual matrix of the present case which the learned judge of the High Court overlooked. And they certainly add a new complexion to the whole case.

[175] And had the lands belonged to the first respondent, the agreements
G dated 10 March 1951 and 8 March 1952 and both the powers of attorney would not have been necessary. With respect, the learned judge of the High Court in rejecting the evidence of the deceased appellant did not state the reasons for so doing.

H **[176]** It must be borne in mind that Tow Siang Ling was requested by the first respondent to attend court as reflected in a letter dated 8 January 1988 as seen at p 838 of the appeal record at Vol 6, which letter has been reproduced, yet he did not attend court. To add salt to the injury, he did not even affirm any affidavit.

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[177] There is an agreement dated 9 May 1951 as seen at pp 312, 312(a) and 313 of the appeal record at Vol 3 entered between the deceased appellant and the financiers. The terms of this agreement supports and verifies the deceased appellant's purchase of lands from the landowners as the proprietor from the

financial assistance rendered by the financiers. In this agreement too, the deceased appellant agreed to remunerate the financiers via the tributes paid on the bauxite as produced. This agreement adds credence to the deceased appellant in that it shows the reason why the deceased appellant had to assign the tributes payable to him by the first respondent to various other persons. This agreement too categorically dismisses the first respondent's contention that the respondents had forwarded the purchase monies to enable the deceased appellant to purchase the lands from the original landowners. In reality, the various sums advanced by the respondents was towards the expenses incurred for the procurement of the proprietary mining licences as reflected at cl 13 of the agreement dated 10 March 1951.

[178] The sum total of it all would be this. That the deceased appellant's contentions are supported by the available evidence.

[179] The factual matrix may be rehearsed in this fashion:

(a) That the deceased appellant had acquired the said lands as the proprietor and had paid the purchase price.

(b) That the deceased appellant obtained financial assistance prior to his meeting with the miners. This rebuts the first respondent's contention that the respondents had advanced monies for the purchase of the said lands.

(c) That the deceased appellant acquired the proprietary mining licences and was authorised to mine for bauxite and aluminium ores from 27 January 1951 for successive terms of two years throughout the span of 21 years.

(d) That the first respondent was incorporated for the purpose of carrying out the mining works and that the deceased appellant had transferred the said lands to the first respondent in order to facilitate the mining operations.

(e) That the deceased appellant had acquired the lands and had obtained the proprietary mining licences before he came to know about the miners. This piece of evidence is supported by the agreement dated 10 March 1951 as well as exh P1.

(f) That the deceased appellant retained the right of entry to the lands and the right to inspect the books of accounts of the first respondent.

(g) That the deceased appellant was entitled to receive payment of the tributes from the bauxite and ores that were produced on the lands and that he was equally responsible to pay the tributes to the original landowners.

(h) That the deceased appellant executed the powers of attorney in favour of

A the first respondent only for the duration of the proprietary mining licences in order to facilitate the mining operations and not to shower the first respondent with the powers to sell and transfer the said lands to the second respondent.

B (i) That the deceased appellant had deposited the titles to the said lands with the first respondent as security. This is to ensure that during the tenure of the mining operations the deceased appellant will not encumber the said lands.

C **[180]** There is an agreement dated 9 June 1952 between Syed Nit bin Ali as the vendor and the deceased appellant of Messrs Ramunia Bauxite Limited, 66 High Street Singapore as the purchaser. And this agreement can be seen at pp 394–396 of the appeal record at Vol 3. The terms of this agreement unlike the other agreements entered by the deceased appellant as the proprietor is a D classic example where the deceased appellant had purchased the said land for and on behalf of the first respondent and that Syed Nit bin Ali as the vendor, being the original land owner, had expressly relinquished all title and interest in the said land in favour of the first respondent. In this agreement too, by virtue of cl 3, the vendor unequivocally appoints the first respondent as his lawful E attorney to apply for proprietary mining licence and to do all acts necessary to facilitate the transfer of the said land from the vendor to the purchaser as well as to facilitate the mining operation.

F **[181]** There were other sale and purchase agreements where the terms clearly showed outright sale of the lands to the respondents. The terms also expressly stated the purchase prices and the transfers of all interests and titles in the lands to the respondents.

G **[182]** It would be ideal to itemise the other sale and purchase agreements and the following examples would suffice:

(a) Agreement between Syed Abdullah bin Ismail as the vendor with the second respondent (Promet Bhd) as the purchaser dated 23 August 1982 for the transfer of 2/5 of EMR 41, Lot No 156 (see pp 527–532 of the H appeal record at Vol 5).

(b) Agreement between Syed Abdullah bin Ismail as the vendor with the second respondent (Promet Bhd) as the purchaser dated 23 August 1982 for the transfer of 1/5 of EMR 41, Lot No 156 (see pp 533–540 of the appeal record at Vol 5). I

(c) Agreement between Syed Abdullah bin Ismail as the vendor with the second respondent (Promet Bhd) as the purchaser dated 23 November 1982 for the transfer of EMR 34, Lot No 153 (see pp 541–546 of the appeal record at Vol 5).

(d) Agreement between Syed Mohsin bin Jaafar @ Said Masin bin Said Jaapar as the vendor and the first respondent (Ramunia Bauxite Pte Ltd) dated 22 February 1983 for the transfer of EMR 42, Lot No 150 (see pp 547–554 of the appeal record at Vol 5).

(e) Form 14A executed by Syed Abdullah bin Ismail in favour of the second respondent (Promet Bhd) for the transfer of 2/5 of EMR 41, Lot No 156 dated 21 January 1989 (see pp 555–558 of the appeal record at Vol 5).

(f) The memorandum of transfer executed by Salleh bin Malik in favour of the first respondent for EMR 125, Lot No 143 dated December 1955 (see pp 559–560 of the appeal record at Vol 5).

(g) At Tab 'B' (i) at p 465 of the appeal record at Vol 4, the list of lands in Teluk Ramunia acquired directly by the first respondent and transferred thereafter to the second respondent can be seen. The list is as follows:

No	Title No/ Lot No.	Area A.R.P.	Transaction No.	Transfer No.	Date of Registration	Transferor	Date of Transfer Registration to 2nd Defendant
30.	EMR 125 143	1.0.38	31/56	20/56	5-3-1956	Salleh Bin Malik as Administrator	4-9-1983 (Transaction No. 495/83 Transfer No. 185/83)
31.	EMR 122 133	2.0.16	61/54	19/54	31-5-1954	Minah Bte Mohd Yusof and 15 Others	4-9-1983 (Transaction No. 495/83 Transfer No. 185/-)
32.	EMR 118 132	4.0.38	11/56	7/56	28-1-1956	Syed Abdul Ghani Bin Mohamad as Administrator	4-9-1983 (Transaction No. 495/83 Transaction No. 185/83)

(h) At Tab 'B' (ii) at p 465 of the appeal record at Vol 4, the list of lands in Teluk Ramunia acquired directly by the second respondent can also be seen. It is as follows:

No.	Title No.	Lot No.	Area A.R.P.	Transaction No.	Transfer No.	Date of Registration	Transferor
33.	EMR 34	153	1.1.26	295/84	152/84	20-8-1984	Syed Abdullah Bin Ismail as Administrator
34.	EMR 41	156	3.0.21	264/84	133/84	1-8-1984	Syed Abdullah Bin Ismail as Administrator
35.	EMR 42	150	3.1.03	396/84	199/84	8-11-1984	Syed Mohsin Bin Jaafar @ Said Masin Bin Said Jaafar as Administrator.

[183] All these facts must be considered as a whole. They cannot be taken in isolation.

[184] It would be unconscionable to allow the first respondent or the second respondent to resile from their conscientious obligations to transfer the lands back to the deceased appellant upon completion of the mining operations.

[185] Brennan J in *Bahr and another v Nicolay and others* (1998) 78 ALR 1, sitting in the High Court of Australia, sets out the law lucidly in these words (see p 35):

> However, the title of a purchaser who not only has notice of an antecedent unregistered interest but who purchases on terms that he will be bound by the unregistered interest is subject to that interest. Equity will compel him to perform his obligation. In *Barry v Heider* [1914] 19 CLR 197, Isaacs J said of the Land Transfer Acts (at p 213): 'They have long, and in every State, been regarded as in the main conveyancing enactments, and as giving greater certainty to titles of registered proprietors, but not in any way destroying the fundamental doctrines by which courts of equity have enforced, as against registered proprietors, conscientious obligations entered into by them.'
>
> In *Frazer v Walker* [1967] 1 AC 569 at p 585, the Privy Council said that the principle of indefeasibility 'in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant'.
>
> Barwick CJ, who was a member of the Judicial Committee in Frazer v Walker, commented in *Breskvar v Wall* (1971) 126 CLR 376 at pp 384–5: 'Proceedings may of course be brought against the registered proprietor by the persons and for the causes described in the quoted sections of the Act or by persons setting up matters depending upon the acts of the registered proprietor himself. These may have as

their terminal point orders binding the registered proprietor to divest himself wholly or partly of the estate or interest vested in him by registration and endorsement of the certificate of title'.

Orders of that kind do not infringe the indefeasibility provisions of the TLA. Those provisions are designed to protect a transferee from defects in the title of the transferor, not to free him from interests with which he has burdened his own title. In *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491 Lord Moulton gave an example of a case where equity would enforce the terms on which a transfer was taken. He said (at pp 504–5):

> Take for example the simple case of an agent who has purchased land on behalf of his principal but has taken the conveyance in his own name, and in virtue thereof claims to be the owner of the land whereas in truth he is a bare trustee for his principal. The court can order him to do his duty just as much in a country where registration is compulsory as in any other country, and if that duty includes fresh entries in the register or the correction of existing entries it can order the necessary acts to be done accordingly.

[186] Continuing at 36 of the report, Brennan J had this to say:

A registered proprietor who has undertaken that his transfer should be subject to an unregistered interest and who repudiates the unregistered interest when his transfer is registered is, in equity's eye, acting fraudulently and he may be compelled to honour the unregistered interest. A means by which equity prevents the fraud is by imposing a constructive trust on the purchaser when he repudiates the unregistered interest. That is not to say that the registration of the transfer to such a proprietor is affected by such fraud as may defeat the registered title: the fraud which attracts the intervention of equity consists in the unconscionable attempt by the registered proprietor to deny the unregistered interest to which he has undertaken to subject his registered title. The principles are stated in *Bannister v Bannister* [1948] 2 All ER 133 and *Lyus v Prowsa Developments Ltd* [1982] 1 WLR1044; [1982] 2 All ER 953. In Bannister, Scott LJ said (at p 136):

> It is, we think, clearly a mistake to suppose that the equitable principle on which a constructive trust is raised against a person who insists on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest, which, according to the true bargain, was to belong to another, is confined to cases in which the conveyance itself was fraudulently obtained. The fraud which brings the principle into play arises as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest, and that is the fraud to cover which the Statute of Frauds or the corresponding provisions of the Law of Property Act 1925, cannot be called in aid in cases in which no written evidence of the real bargain is available. Nor is it, in our opinion, necessary that the bargain on which the absolute conveyance is made should include any express stipulation that the grantee is in so many words to hold as trustee. It is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another.

[187] In similar vein, Chadwick LJ speaking for the Court of Appeal in *Banner Homes Group plc v Luff Developments Ltd and another* [2000] 2 All ER 117, had this to say at pp 137–138:

> The *Pallant v Morgan* equity
>
> I have thought it appropriate to analyse the decisions at first instance in more detail than might otherwise have been necessary in the circumstances that the present appeal provides the first opportunity, so far as I am aware, for this court to consider the basis and scope of what may be called the *Pallant v Morgan* equity in a case in which reliance has to be placed upon it by the appelant. In my view there is no doubt that such an equity does exist and is firmly based. It is *Lonrho plc v Fayed (No 2)* [1991] All ER at pp 969–970; [1992] 1 WLR 1 at pp 9–10:
>
> > Equity will intervene by way of constructive trust, not only to compel the defendant to restore the plaintiffs property to him, but also to require the defendant to disgorge property which he should have acquired, if at all, for the plaintiff. In the latter category of case, the defendant's wrong lies not in the acquisition of the property, which may or may not have been lawful, but in his subsequent denial of the plaintiffs beneficial interest. For such to be the case, however, the defendant must either have acquired property which but for his wrongdoing would have belonged to the plaintiff, or he must have acquired property in circumstances in which he cannot conscientiously retain it as against the plaintiff.
>
> Or, as the same judge was to say in this court, in the passage in *Paragon Finance plc v DB Thakerar & Co (a firm), Paragon Finance plc v Thimblely & Co (a firm)* [1999] 1 All ER 400 at pp 408–409, to which I have already referred:
>
> > His (the defendant's) possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust.
>
> It is important, however, to identify the features which will give rise to a *Pallant v Morgan* equity and to define its scope; while keeping in mind that it is undesirable to attempt anything in the nature of an exhaustive classification. As Millett J pointed out in *Lonrho plc v Fayed (No 2)* [1991] 4 All ER 961 at p 969, [1992] 1 WLR 1 at p 9, in a reference to the work of distinguished Australian commentators, equity must retain its 'inherent flexibility and capacity to adjust to new situations by reference to mainsprings of the equitable jurisdiction'. Equity must never be deterred by the absence of a precise analogy, provided that the principle invoked is sound. Mindful of this caution, it is, nevertheless, possible to advance the following propositions. (1) A *Pallant v Morgan* equity may arise where the arrangement or understanding on which it is based precedes the acquisition of the relevant property by one of those parties to that arrangement. It is the pre-acquisition arrangement which colours the subsequent acquisition by the defendant and leads to his being treated as a trustee if he seeks to act inconsistently with it.

[188] Continuing at p 139 of the report, Chadwick LJ aptly said:

> It is the existence of the advantage to the one, or detriment to the other, gained or suffered as a consequence of the arrangement or understanding, which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for himself, in a manner inconsistent with the arrangement or understanding which enabled him to acquire it. *Pallant v Morgan* [1952] 2 All ER 951; [1953] Ch 43 itself provides an illustration of this principle.

[189] In *Yaxley v Gotts and another* [2000] 1 All ER 711, Beldam LJ writing a separate judgment for the Court of Appeal had this to say at p 736 of the report:

> There was on the judge's findings, as I interpret them, a clear promise made by Brownie Gotts to the plaintiff that he would have a beneficial interest in the ground floor of the premises. That promise was known to Alan Gotts when he acquired the property and he permitted the plaintiff to carry out the whole of the work needed to the property and to convert the ground floor in the belief that he had such an interest. It would be unconscionable to allow either Alan or Brownie Gotts to resile from the representations made by Brownie Gotts and adopted by Alan Gotts. For my part I would hold that the plaintiff established facts on which a court of equity would find that Alan Gotts held the property subject to a constructive trust in favour of the plaintiff for an interest in the ground floor and that that interest should be satisfied by the grant of a 99 year lease.

[190] In *Loke Yew v Port Swettenham Rubber Company, Limited*, Lord Moulton speaking for the Privy Council aptly said at pp 504–505 of the report:

> So long as the rights of third parties are not implicated a wrongdoer cannot shelter himself under the registration as against the man who has suffered the wrong. Indeed the duty of the court to rectify the register in proper cases is all the more imperative because of the absoluteness of the effect of the registration if the register be not rectified. Take for example the simple case of an agent who has purchased land on behalf of his principal but has taken the conveyance in his own name, and in virtue thereof claims to be the owner of the land whereas in truth he is a bare trustee for his principal. The court can order him to do his duty just as much in a country where registration is compulsory as in any other country, and if that duty includes fresh entries in the register or the correction of existing entries it can order the necessary acts to be done accordingly. It may be laid down as a principle of general application that where the rights of third parties do not intervene no person can better his position by doing that which it is not honest to do, and inasmuch as the registration of this absolute transfer of the whole of the original grants was not an honest act under the circumstances it cannot better the position of the plaintiffs as against the defendant and they cannot rely on it as against him when seeking to enforce rights which formally belong to them only by reason of their own fraud. It must be remembered that in the present case the defendant immediately on the bringing of the action applied to rectify the register and that such rectification only awaits the event of this suit. His right to it is set up in the defence, so that he has taken all the necessary steps to obtain the full relief to which he is entitled.

[191] Equity would always intercede. And equity would undo a fraudulent transfer by imposing a constructive trust on the purchaser when the purchaser repudiates the unregistered interest. The fraud in this case which attracts the intervention of equity consists in the unconscionable attempt by the registered proprietor to deny the unregistered interest to which he has undertaken to subject his registered title.

[192] On constructive trust, it is ideal to refer to the decision of Millett LJ in *Paragon Finance plc v DB Thakerar & Co (a firm); Paragon Finance plc and another v Thimbleby & Co (a firm)* [1999] 1 All ER 400. At pp 408–409, His Lordship had this to say:

> … the expressions 'constructive trust' and 'constructive trustee' have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.
>
> A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well known examples of such a constructive trust are *McCormick v Grogan* (1869) LR 4 HL 82 (a case of a secret trust) and *Rochefoucald v Boustead* [1897] 1 Ch 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded).*Pallant v Morgan* [1952] 2 All ER 951; [1953] Ch 43, (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the properly. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.

[193] Equity will certainly intervene to provide relief against unconscionable conduct. The observations by Sir Nicolas Browne-Wilkinson VC in *Grant v Edwards and another* [1986] 2 All ER 426 at p 439; [1986] Ch 638 at p 656 are germane and they should be reproduced:

> I suggest that, in other cases of this kind, useful guidance may in the future be obtained from the principles underlying the law of proprietary estoppel which in my judgment are closely akin to those laid down in *Gissing v Gissing*. In both, the claimant must to the knowledge of the legal owner have acted in the belief that the claimant has or will obtain an interest in the property. In both, the claimant must have acted to his or her detriment in reliance on such belief. In both, equity acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. The two principles have been developed separately without cross-fertilisation between them; but they rest on the same foundation and have on all other matters reached the same conclusions.

[194] This is a case of a constructive trust in response to an unconscionable behaviour of the respondents. Speaking generally, a constructive trust is said to arise by operation of law (see J Mowbray et al, *Lewin on Trusts,* (18th Ed), Sweet and Maxwell, 2008 ('Lewin') at p 229; J Martin, *Hanbury and Martin's Modern Equity* (16th Ed), Sweet and Maxwell, 2001 ('Martin') at p 297; and A Oakley, Parker and Mellows, *The Modern Law of Trusts* (8th Ed), Sweet and Maxwell, 2003 ('Parker and Mellows') at p 312).

[195] A constructive trust arises automatically. It is to be construed retrospectively from the time of the circumstances which give rise to it. The common vein running through all the species of constructive trust is this: that the liability of any person to act as a constructive trustee is predicated on that person having knowledge of some factor which is deemed to affect his conscience sufficiently strong enough in order to justify the invocation of the principle of constructive trust (*Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL)).

[196] According to Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, a proprietary constructive trust will be imposed on any person who knows that his actions in respect of specific property are unconscionable. In order to impose a proprietary constructive trust, the legal owner of the property will be liable if he has knowledge of some factor which affects the conscionability of asserting beneficial title to that property.

[197] His Lordship Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* at p 705 chronicled 'the relevant principles of trust law' in these erudite terms:

> (a) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).

(b) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, ie until he is aware that he is intended to hold the properly for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.

(c) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property.

(d) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.

[198] The first respondent is a trustee in relation to the 29 pieces of land in circumstances in which, as a legal owner of that property, the first respondent acts contrary to good conscience. The first respondent certainly had knowledge of the background facts which gave rise to the constructive trust. And with knowledge of the background facts that would be sufficient to trigger the proprietary constructive trust on the first respondent.

[199] In regard to the distinction between institutional and remedial constructive trusts, Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* had this to say at pp 714–715 of the report:

> Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.

[200] In England, the traditional view has been to view constructive trust as a substantive institution like any other trust. In recent past, attempts were made to expand the constructive trust. Thus, the 'constructive trust of the new model' was born and it was championed by Lord Denning in *Hussey v Palmer* [1972] 3 All ER 744 at p 747 (CA), when His Lordship likened constructive and resulting trusts and held that, 'The two run together. By whatever name it is described, it is a trust imposed by law whenever justice and good conscience

require it'. Later, in *Eves v Eves* [1975] 3 All ER 768 (CA), Lord Denning described the new model constructive trust as the latest example of equity's continued capacity for child-bearing, and applied it to allow a woman a share in a house in which she had cohabited.

[201] The learned judge of the High Court held that 'the facts clearly established that the plaintiff (referring to the appellant) was merely holding the 29 lots of land now claimed by the plaintiff (referring to the appellant) *on trust* for the first defendant (referring to the first respondent)'. With respect, the learned judge of the High Court failed to consider that the first respondent as a wrongdoer cannot shelter itself under the registration as against the appellant who has suffered the wrong. Indeed it is the duty of this court to rectify the register because of the absoluteness of the effect of registration if the register is not rectified.

[202] Before he died, the deceased appellant had left sufficient evidence to support the assertions that the respondents chose to hide behind the register in order to evade their conscientious obligations.

[203] My learned brother A Samah Nordin JCA drew my attention that out of the 29 pieces of land listed on the list as reproduced earlier, three of them must be excluded. Thus, No 13 on the list bearing EMR 115, Lot No 140 should be excluded. And No 15 on the list bearing EMR 43, Lot No 155 should also be excluded. And, lastly, No 16 on the list bearing EMR 23, Lot No 149 should also be excluded.

[204] Now, No 13 on the list bearing EMR 115, Lot No 14 alluded to an agreement dated 19 June 1952 between Tuan Busu bin Mos as the vendor and the deceased appellant as a director of the first respondent as the purchaser. The deceased appellant purchased the land measuring two acres one rood and 15 poles. The agreement can be seen at pp 624–625 of the appeal record at Vol 5. And the register document of title can be seen at p 444 of the appeal record at Vol 4.

[205] While No 15 on the list bearing EMR 43, Lot No 155 referred to an agreement dated 14 May 1952 between Omar bin Sidek as the vendor and the deceased appellant of Messrs Ramunia Bauxite Ltd (the first respondent) as the purchaser. The deceased appellant purchased the land measuring five acres one rood and three poles. The agreement can be seen at pp 619–620 of the appeal record at Vol 5. And the register document of title can be seen at p 446 of the appeal record at Vol 4.

[206] And, number 16 on the list bearing EMR 23, Lot No 149 referred to an agreement dated 14 May 1952 between Syed Abdullah bin Hamzah as the

vendor and the deceased appellant of Messrs Ramunia Bauxite Ltd (the first respondent) as the purchaser. The deceased appellant purchased the land measuring five acres one rood and 11 poles. The agreement can be seen at pp 617–618 of the appeal record at Vol 4. And the register document of title can be seen at p 447 of the appeal record at Vol 4.

[207] Finally, on the issue of limitation, I need only to refer to the judgment of Mohd Yusoff bin Mohamed J (later SCJ) at pp 87–90 of the appeal record at Vol 1 where His Lordship in a well written judgment dated 16 September 1987 had dealt in extenso with the issue of limitation and held that it was not an issue at all and that limitation has not set in. There was *no appeal lodged against the decision of Mohd Yusoff bin Mohamed J (later SCJ) at all. For convenience, I will now reproduce the judgment of His Lordship:*

IN THE HIGH COURT OF MALAYA AT JOHORE BAHRU

CIVIL SUIT NO. 821/85

Between

ABDUL KADIR BIN AMI

.. PLAINTIFF

And

1) RAMUNIA BAUXITE PRIVATE LTD.

2) PROMET BERHAD

.. DEFENDANTS

JUDGMENT MOHD YUSOFF BIN MOHAMED J

(1) The defendants apply to strike out the plaintiff's summons and statement of claim on the grounds that the statement of claim discloses no reasonable cause of action and that it is vexatious and an abuse of the process of the court. It is also contended by the defendants that the facts relied on by the plaintiff occurred more than 12 years before the writ was issued and therefore the plaintiff is barred by Limitation Act 1953.

(2) Reading both the contentious affidavits and all the agreements as a whole I am of the view that the plaintiff can sustain an arguable case. The first group of eight pieces of lands were originally the subject of an agreement between the plaintiff and Datuk Wong Shee Fun and others in 1951 for the purpose of mining. These lands were sold and transferred by the official assignee to the first defendant in 1955 after the plaintiff was adjudged a bankrupt. The plaintiff was discharged only in 1983.

(3) Counsel on behalf of the defendants contended that even assuming that the official assignee sold the plaintiffs land without consulting him was improper, the plaintiff's present suit to set aside the sale is statute barred by s 9 of the Limitation Act limiting the claim to 12 years. The short answer to this is that the

plaintiff was under the disability as an undischarged bankrupt whereupon he could not have sued the official assignee or the earlier defendants without leave of the official assignee himself. He was discharged only in 1983 and for the purpose of the limitation period for instituting this claim, in my opinion, time begins only from 1983. Also relevant is s 341 of the National Land Code barring adverse possession against the person entitled to interest in land as the plaintiff.

(4) The defendants' counsel further argued that there was no fraud or misrepresentation alleged by the plaintiff and therefore the defendants' title is indefeasible. This contention is premature and can only be set up as a defence to an action but not as a ground for dismissing an action under the present proceeding — see *Mohamed Salleh v Lau Siok Kee* [1974] 1 MLJ 102 at p 103 (FC).

(5) The second group of 41 titles of lands were also the subject of the agreements between the plaintiff and the first defendant. These lands were apparently transferred to the first defendant for the purpose of mining and not outright transfers of proprietory interests in the lands to the defendants. These transfers were necessary for the purpose of converting the lands from their original agricultural holdings to mining category. This, in my view, explains the fact that the first defendant continued to pay royalty both to the original owners of the lands as well as to the plaintiff when mining operations were in progress. The affidavits and documents so far produced show that these factors exist; whether or not the plaintiff can successfully show that these are the true facts is left to be decided at a proper trial.

(6) For these reasons I dismissed the defendants' application to strike out the summons and the statement of claim with costs.

(7) It follows that in order to preserve status quo between the parties the plaintiffs application for an injunction restraining the defendants from completing the sale of these 49 pieces of lands should be granted. I ordered accordingly.

(DATO MOHD. YUSOFF BIN MOHAMED)

JUDGE

HIGH COURT MALAYA

JOHOR BAHRU

DATE: 16th September, 1987.

Solicitors:

(1) Mr HL Tennakoon

(M/s HL Tennakoon) for plaintiff.

(2) Mr A Chai

(M/s Nik Saghir, Yaacob & Ismail) for defendants.

[208] Thus, the case proceeded to trial as scheduled bearing in mind that the issue of limitation was no longer relevant and was not a live issue at all.

[209] For the reasons adumbrated above, the appellant's appeal must be allowed with costs. And costs is fixed at RM100,000, here and below, to be paid by the respondents to the appellant. Deposit should be refunded to the appellant.

[210] The appellant's claim for the transfer of the 29 pieces of land — now it is 26 pieces of land after taking out three pieces of land as alluded to above, is allowed. What this amounts to is this:

(a) that an order is hereby given that the first respondent do sign, execute, seal and deliver to the appellant and/or her nominees duly perfected instruments of transfer of all the 26 pieces of land together with the documents of title thereto; and

(b) that an order is hereby given that the first respondent and the second respondent do deliver up the agreements of sale or other instruments relating to the intended sale of the 26 pieces of land for cancellation.

[211] My learned brother A Samah Nordin JCA agrees with majority judgment and he is writing a separate majority judgment.

Abu Samah JCA:

BACKGROUND

[212] The original appellant, Abdul Kadir bin Ami, now deceased, was the immediate past registered owner of eight lots of agricultural lands as set out in the First Schedule and another 41 lots of agricultural lands as set out in the Second Schedule to the amended statement of claim. He was also the original holder of proprietary mining licences to mine bauxite and aluminium ores over the eight lots of agricultural lands referred to in the First Schedule of the statement of claim.

[213] The first respondent was a foreign company incorporated in Singapore on 3 October 1951 pursuant to an agreement ('the first agreement') dated 10 March 1951 between the appellant and four individuals, namely Wong Shee Fun, Tow Keng Hee, Tow Siang Ling and Ng Yook Lin ('the miners'). The first respondent company was formed with the expressed intention to prospect and mine for bauxite and aluminium ores on the said eight lots of the appellant's lands in Telok Ramonia, Kota Tinggi, Johor (see cl 11 of the first agreement). The appellant was made a director of the first respondent from its inception until 1954.

[214] By virtue of cl 1 of the first agreement the miners were allowed to enter into possession of the said eight lots to mine bauxite and aluminium ores for a

consideration of $20,000 paid to the appellant. The terms of the said agreement also applies to any other future proprietary mining licences granted to the appellant over any other lands in Telok Ramonia which the appellant may acquire.

[215] On 8 March 1952 the appellant entered into an agreement ('the second agreement') with the first respondent. By cl 1 of the second agreement the first respondent was allowed to enter into possession of the other 41 lots of land owned or occupied by the appellant, to prospect and mine for bauxite and aluminium ores or any other mineral ores for a consideration of $18,725 paid to the appellant. The particulars of the 41 lots of land are specified in the Schedule to the second agreement. They are also listed in the Second Schedule to the amended statement of claim. Pursuant to the second agreement, the appellant, on diverse dates between July 1952 and June 1953 transferred all the 41 lots of land in the Schedule to the first respondent. The consideration for the said transfer as stated in the transfer document was the agreement itself. It was not for a cash consideration.

[216] By cl 16 of the second agreement the appellant is obliged to grant an irrevocable power of attorney to the first respondent for the term of the proprietary mining licences and 'for as long as there are ores to be won from the lands'. The said power of attorney was given to the first respondent on the same day, ie 8 March 1952.

[217] The second respondent is the holding company of the first respondent. The first respondent became a wholly owned subsidiary of the second respondent after the latter bought the first respondent's shares pursuant to an agreement dated 24 October 1981. Then, in 1983 the first respondent sold and transferred all the 41 lots of land to the second respondent (see Form 14A at p 826, Vol 6, appeal record).

[218] On 28 May 1955 the appellant was adjudicated a bankrupt and remained as such for more than 27 years, until his bankruptcy was annulled on 12 January 1983. As a result of his bankruptcy all his assets and property became vested with the official assignee. This includes the eight lots of land which is the subject of the first agreement. The official assignee, with the approval of the court, subsequently sold all the eight lots of land to the first respondent.

[219] Soon after his discharge as a bankrupt, the appellant engaged a firm of solicitors, Messrs Nathan & Yang to write a letter dated 16 February 1983 to the Inspector of Mines, Johor Bahru asking for particulars of mining licences issued to the first respondent and their expiry dates. The inspector of mines by a letter dated 22 February 1983 informed the appellant's solicitors that the last

mining licences issued to the first respondent was for a period from 17 November 1972 to 31 May 1973. It is not in dispute that the last mining licences expired in 1973.

[220] This prompted the appellant to demand through his solicitors, that the first respondent retransferred back to him all the 41 lots of lands which he had earlier transferred to the first respondent on diverse dates. The first respondent refused to entertain the request.

THE PLEADINGS

[221] On 7 September 1985 the appellant filed this action against the respondents to reassert his rights over the said lands and sought the following reliefs:

(a) for an order that the first defendant do sign execute seal deliver to the plaintiff and/or his nominees duly perfected instruments of transfer of all the eight pieces of land together with the documents of title thereto;

(b) for an order that the first defendant do sign execute seal and deliver to the plaintiff and/or his nominees duly perfected instruments of transfer of all 41 pieces of land together with the documents of title thereto;

(c) for an order that the first and second defendants do deliver up the agreement of sale or other instrument relating to the intended sale of the eight pieces and 41 pieces of the land for cancellation;

(d) for an injunction restraining the first and second defendants whether by themselves or by their servants or agents or otherwise howsoever until judgment in this action or further order from doing any act whatsoever in furtherance of the said sale and purchase of any of the lands aforesaid;

(e) for an order that the first defendant do render an account of all bauxite won and removed from any and all of the lands in the eight pieces and 41 pieces of land;

(f) for an order that the first defendant do render an account of all tribute paid in respect of the bauxite won and removed as aforesaid;

(g) for an order that the first defendant do pay to the plaintiff such sum as may be found to be payable as tribute and remaining unpaid;

(h) costs; and

(i) such other order as this honorable court may deem fit and proper.

[222] In his statement of claim, the appellant, inter alia, pleaded that the first respondent had fraudulently refused to retransfer the said 41 lots to him. The particulars of fraud are spelt out in paras 14.1–14.4 of his statement of claim.

[223] The respondents, in their statement of defence, denied the appellant's claims and pleaded, inter alia, that the appellant's action was statute barred by virtue of s 9(1) of the Limitation Act 1953. The first respondent further claimed that the appellant had purchased the said lots on its behalf for valuable consideration and that it had acquired indefeasible title to the said lots and subsequently sold and transferred the said lots to the second respondent for valuable consideration.

[224] On 11 November 1986 the appellant obtained an injunction against the respondents restraining them, their servants or agents from completing the sale of the 49 pieces of lands or any of them from the first respondent to the second respondent pending final deposal of this suit; or if such sale has been completed, the second respondent be restrained from entering into or completing the sale thereof to any other party.

[225] The respondents tried to shut out the appellant's claim by filing an application to strike out the statement of claim under O 18 r 19 of the Rules of the High Court 1980 on the ground that it disclosed no reasonable cause of action and that it was vexatious and an abuse of the process of the court. It was also contended that the action was statute barred as the facts relied on by the appellant occurred more than 12 years before the writ was issued.

[226] It was dismissed by Yusof J (as he then was). On the issue of limitation, this is what the learned judge said:

> The short answer to this is that the plaintiff was under the disability as an undischarged bankrupt whereupon he could not have sued the official assignee or the earlier defendants without the leave of the official assignee. He was discharged only in 1983 and for the purpose of the limitation period for instituting this action, in my opinion, the time begins only from 1983.

There was no appeal against that decision.

[227] With regard to the 41 titles of land, which is the subject matter of the second agreement between the appellant and the first respondent, the learned judge said:

> These lands were apparently transferred to the first defendant for the purpose of mining and not outright transfers of proprietary interests in the lands to the defendants. These transfers were necessary for the purpose of converting the lands from their original agricultural holdings to mining category. This in my view explains the fact that the first defendant continued to pay royalty both to the original owners of the lands as well as to the plaintiff when mining operations were in progress.

[228] The respondents appealed against the said decision. It was dismissed by the Supreme Court on 21 March 1988.

ISSUES AT TRIAL

[229] At the trial before the High Court, the agreed issues for the court's determination were as follows:

(1) The construction of the agreement dated 8 March 1952.

(2) The construction of the power of attorney dated 8 March 1952.

(3) The transfer of 41 pieces of land to the first defendant pursuant to the agreement dated 8 March 1952 was only to facilitate the mining operations carried out by the first defendant and was not at any material time intended to be a transfer of all rights, titles and interests in the said 41 pieces of land to the first defendant.

(4) The consideration of RM18,725 paid to the deceased Abdul Kadir bin Ami pursuant to the agreement dated 8 March 1952 and the power of attorney dated 8 March 1952 was to entitle the first defendant the right to enter into possession of the 41 pieces of land and mine the lands and not for the purchase of the said lands for and on behalf of the first defendant.

(5) The transfer of the 41 pieces of land to the second defendant by the first defendant on or about 4 April 1983 is in breach of both the agreement dated 8 March 1952 and the power of attorney dated 8 March 1952.

(6) The deceased Abdul Kadir bin Ami at all material time is the rightful and beneficial owner of the 41 pieces of land.

[230] Unfortunately the appellant passed away on 15 February 1995 before he could testify in court. His daughter, the present appellant, was substituted as a party by a court order dated 13 September 1995.

[231] The main evidence against the respondents is based on documentary evidence, namely the second agreement, the irrevocable power of attorney dated 8 March 1952, the first agreement which laid the foundation for the parties subsequent dealings; and the minutes of the meeting held on 14 December 1952 between the District Officer, Kota Tinggi, the Collector of Land Revenue, Kota Tinggi, Mr WA Contrad, the managing director of E Ott Co Ltd, Mr C Schwanter, Mr Toh Siang Ling, Che Abdul Kadir bin Ami ('the deceased'), Assistant District Officer, Pengerang and 22 'landowners' who 'sold' their lands to the deceased.

[232] In the course of the trial the appellant abandoned his claim in respect

of the eight lots which were sold to the first respondent by the official assignee whilst he was still an undischarged bankrupt. Out of the 41 lots in the Schedule of the second agreement the appellant now confined his claim against the first and second respondents to 29 lots only. The particulars of these 29 lots are as follows:

No	Title	Lot No.	Area A.R.P	Transaction No	Transfer No	Date of Registration to Appellant	Date of Registration to 1st Respondent
1	EMR 30	170	2.0.29	144/52	71/29	23/6/51	14/7/1957
2	EMR 33	168	4.0.23	39/53	23/53	10/12/51	7/6/1953
3	EMR 36	164	1.3.16	39/53	23/53	10/12/52	7/6/1953
4	EMR 137	128	2.0.22	145/52	72/52	30/5/51	14/7/1952
5	EMR 44	169	4.0.01	154/52	81/52	30/5/51	15/7/1952
6	EMR 37	167	2.1.19	138/52	65/52	30/5/51	14/7/1952
7	EMR 26	157	2.1.06	159/52	86/52	30/5/51	15/7/1952
8	EMR 40	161	3.0.33	146/52	73.52	30/5/51	15/7/1952
9	EMR 38	158	1.1.36	136/52	63/52	30/5/51	14/7/1952
10	EMR 27	162	2.3.29	149/52	76/52	2/6/51	15/7/1952
11	EMR 28	163	2.2.30	150/52	77/52	30/5/51	15/7/1952
12	EMR 124	144	3.1.16	151/52	78/52	2/6/51	15/7/1952
13	EMR 115	140	2.1.15	23/53	39/53	10/12/52	7/6/1953
14	EMR 50	148	10.3.20	156/52	83/52	16/8/51	15/7/1952
15	EMR 43	155	5.1.03	39/53	23/53	10/12/52	7/6/1953
16	EMR 23	149	5.1.11	39/53	23/53	10/12/52	7/6/1953
17	EMR 131	145	2.2.04	140/52	67/52	1/7/52	14/7/1952
18	EMR 35	154	2.0.17	137/52	64/52	2/7/51	14/7/1952
19	EMR 46	152	1.2.08	153/52	80/52	2/8/51	15/7/1952
20	EMR 120	136	3.2.04	142/52	69/52	1/7/52	14/7/1952
21	EMR 119	139	2.1.35	157/52	84/52	2/8/51	15/7/1952
22	EMR 136	142	3.1.28	152/52	79/52	6/8/51	15/7/1952
23	EMR 45	165	1.0.28	148/52	75/52	5/8/51	15/7/1952
24	EMR 132	135	1.2.10	155/52	82/52	2/8/51	15/7/1952
25	EMR 116	134	0.2.16	147/52	74/52	2/8/51	15/7/1952
26	EMR 135	137	2.2.11	141/52	68/52	2/8/51	14/7/1952
27	EMR 29	171	6.3.21	158/52	85/52	5/8/51	15/7/1952
28	EMR 32	166	1.0.14	143/52	70/52	19/1/52	14/7/1952
29	EMR 48	173	3.1.29	139/52	66/52	17/5/52	14/7/1952

[233] The learned judge dismissed the appellant's claims with costs. He held that there was no evidence or agreement to retransfer the lands back to the first respondent at any time after the cessation of mining. The three preambles in the 1952 agreement established the fact that the lands were purchased for and on behalf of the first respondent. The appellant's letter dated 14 December 1952 corroborated the declaration in the said preambles in that the appellant had purchased the lands on behalf of the first respondent out of the first respondent's own funds. The appellant was merely holding the 29 lots of land on trust for the first respondent. Being dissatisfied, the appellant appealed to this court.

THE PRESENT APPEAL

[234] The principles of law in respect of an appeal on findings of fact by the trial judge is well settled. It is suffice for me to refer to what the Federal Court said in *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517. Mohamed Dzaiddin FCJ at p 527 said:

> In the light of the above findings of the learned judge, a fundamental question of principle arises — which is, whether in the circumstances of the case, this court can interfere with the finding of fact of the court below. It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the finding of the court below should be disturbed by a court of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy (*Crofter Hand Woven Harris Tweed Co Ltd and others v Veitch and another* [1942] 1 All ER 142 (HL) per Lord Porter at p 167). However, the authority for the above proposition is the speech of Lord Thankerton in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582, particularly the following passage (at p 587):
>
> (a) Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> (b) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> (c) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

> On the other hand, there is a clear authority also from the House of Lords and followed by the Privy Council which says that a distinction can be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's finding of fact and form an independent opinion that in the case of the former. That authority is the speech of Lord Reid in the House of Lords' decision in *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326, followed later by the Privy Council in the Singapore case of *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 at p 94.

[235] A perusal of the grounds of judgment shows that the learned judge did not really address his mind to the agreed issues for the court's determination. He not only misdirected himself on the facts before him but misconstrued the true purport and intention of the contracting parties when he relied solely on the preambles of the second agreement without scrutinising the terms and conditions therein in concluding that the lands were purchased for and on behalf of the first respondent.

[236] First, let us look at the agreement itself. The preamble to the second agreement states:

> WHEREAS the Proprietor is the registered proprietor, owner or occupant of the lands described in the Schedule hereto (hereinafter referred to as the 'said lands').
>
> AND WHEREAS the Miners have from time to time advanced various sums of money to the Proprietor amounting to Dollars Eighteen thousand seven hundred and twenty-five ($18,725) for the purchase of the said lands in the name of the Proprietor.
>
> AND WHEREAS the said lands have been purchased in the name of the Proprietor for and on behalf of the Miners (as the Proprietor hereby acknowledges).
>
> AND WHEREAS the said lands have been acquired for the express purpose of enabling the Miners to prospect and mine the bauxite and aluminium ores or any other mineral ores on the terms and conditions hereinafter contained.

[237] The terms and conditions of the second agreement, inter alia, state:

> (1) In the consideration of the sum of Dollars Eighteen thousand seven hundred and twenty-five ($18,725) paid by the Miners to the Proprietor (the receipt whereof is hereby acknowledged by the Proprietor) the Proprietor shall allow the Miners to enter into possession of the said lands and on any other lands which the Proprietor may acquire in Telok Ramunia in the Mukim of Pantai Timor in the District of Kota Tinggi and to prospect and make applications for Proprietary Mining licences and or Mining Leases thereto and to mine the same for bauxite and aluminium ores or other ores in the terms and conditions stated in the said Proprietary Mining licences or Mining Leases when issued and to apply for renewal upon such terms or terms as the Government may allow upon a renewal or renewal of the said Proprietary Mining licences or Mining Leases.

(2) …

(3) The Miners shall pay to the Proprietor the sum of Dollars Two ($2.00) only for every ton of bauxite or aluminium ores won and sold or exported from the said lands and such payment shall be made after each sale and shipment of ore.

(4) The Proprietor agrees that any tribute payable to the former landowners of the said lands shall be his own responsibility and shall be payable to the Proprietor under clause 3 herein.

(5) …

(6) …

(7) The Miners shall carry on all mining operations in an orderly, skilful and workmanlike manner and will not cause danger or damage to the owner or occupiers of other lands and shall be liable to indemnify the Proprietor for any expenses which he may incur on account of any breach of this condition by the Miners.

(8) The Miners shall cause to be kept true and sufficient books or account of mining and other business carried on upon the said lands or other lands on the issue of the said Proprietary Mining licences or other Proprietary Mining licences or Mining Leases in accordance with the provisions of the Mining Enactment and the Proprietor or his duly appointed agent may at all reasonable times enter upon and view the said lands and may inspect any books of account of ore produced from the said lands.

(9) The Miners shall in working the said lands on the issue of the said Proprietary Mining licences comply with the provisions or the Mining Enactment and to the rules and regulations made thereunder and in particular to such provisions of and such rules and regulations made under the said Enactment as relate to Proprietary Mining licences.

(10) During the continuance and the renewals of the said Proprietary Mining licences and other Proprietary Mining licences and or mining leases and during the continuance of this agreement the Proprietor shall not sell, charge or in any way encumber the said lands and as a security for such undertaking the Proprietor shall deposit the titles of the said lands and the Proprietary Mining licences and mining leases when issued with the Miners.

(11)…

(12)…

(13)…

(14)…

(15)…

(16) For the better securing to the Miners the proper carrying and conduct of the mining work on the said lands under the said Proprietary Mining licences and under any other Proprietary Mining licences or mining leases within the contemplation of this agreement the Proprietor shall give to the Miners a Power of Attorney irrevocable for the term of the said Proprietary Mining licences and such other Proprietary Mining licences and or mining leases and for such successive term or terms of years as such Proprietary Mining licences or mining leases may from time to time be renewed by the Government and *for as long as there are ores to be won from the lands.* (Emphasis added.)

[238] The word used in the second recital is 'advanced' various sums of money to the proprietor. *Concise Oxford English Dictionary*, (11th Ed), explains the meaning of the word 'advance' as:

(1) …

(2) …

(3) …

(4) Hand over (payment) to (someone) as a loan or before it is due.

[239] *Collins Cobuild English Dictionary for Advanced Learners*, (3rd Ed) explains the meaning of the word 'advance' as follows:

(1) …

(2) …

(3) If you advance someone a sum of money, you lend it to them, or pay it to them earlier than arranged.

(4) An advance is money which is lent or paid to someone before they would normally receive it.

[240] The appellant's cause of action in respect of the 29 lots of land is based on the second agreement. The decision of the trial court therefore cannot be based solely on the terms in the preambles without considering the terms and conditions of the agreement itself. The fourth recital to the preambles expressly states that the lands were acquired or purchased for the express purpose of enabling the miners to prospect and mine the bauxite and aluminium ores or any other mineral ores on the *terms and conditions hereinafter contained*. So, what are these terms and conditions?

[241] Clause 1 clearly states that the sum of $18,725 was paid by the miners to the proprietor (the appellant herein) as a consideration for the proprietor agreeing to allow the miners to enter into possession of the said lands to prospect and mine for bauxite and aluminium ores or any other ores. It does not say that the money was paid to the proprietor in consideration of the sale of his lands. Neither does it say that the money was advanced to the proprietor to purchase the lands for and on behalf of the miners. As can be observed from the agreement, the sum of money stated in the second recital and the sum of money stated in cl 1 of the agreement are of the same amount. But when one examines the second and third recitals vis-a-vis cl 1 of the agreement, they are clearly irreconcilable. It seems to me that although the sums of money referred to in the recitals and cl 1 of the agreement are of the same amount, they are not intended for the same purpose. To say that it is meant for the same purpose would, in my view, be nonsensical and does violence to the language. There is no plausible reason for the miners to pay an extra $18,725 to the proprietor under cl 1 of the agreement to enter into possession of the said lands when they had already paid $18,725 to him to purchase the said lands in the name of the proprietor as contended by the first respondent.

[242] The other terms and conditions of the second agreement are also inconsistent with what is stated in the preamble. The terms and conditions in the second agreement are not what one would ordinarily expect in a normal sale and purchase agreement. These terms and conditions do not state that the appellant purchased the lands for the first respondent. They do not support the contention by learned counsel for the respondents that the sum referred to in the recital was for the purchase of the said lands on behalf of the first respondent. There is absolutely no necessity for the first respondent to pay two dollars to the proprietor under cl 3 of the second agreement for every ton of bauxite or aluminium ores extracted from the lands after having purchased the said lands from previous land owners through the proprietor. Similarly there is also no sensible reason for the proprietor to pay tribute to the former landowners under cl 4 of the second agreement, after having sold the lands to the miners. It seems to me that the terms in cll 3 and 4 of the agreement do not support the view that the proprietor purchased the lands for and on behalf of the first respondent.

[243] Next, look at cl 8 of the agreement. Clause 8 allows the appellant or his agent the right to enter into the lands at all reasonable times and to inspect any books of account of ores produced from the land. It is very unusual for the first respondent to allow a third party, that is, the proprietor or his agent in our case, to enter upon and view the said lands and to inspect any books of accounts of the miners after having bought the lands and paid the full purchase price. This kind of clause is clearly inconsistent with the right of a purchaser who had paid

the full price for the lands. The truth is this. This clause is necessary to protect the rights and interests of the proprietor which are spelt out in cll 3 and 4 of the agreement.

[244] The most obvious and clearest provision that the agreement is not an outright sale of lands by the proprietor to the miners or the first respondent is cl 10. It states that the proprietor shall not sell, charge or in any way encumber the said lands and as security for such undertaking the proprietor shall deposit the titles of the said lands with the miners throughout the continuance or renewals of the proprietary mining licences. That, by itself shows that the appellant had not by this agreement sold his lands to the first respondent. There is absolutely no necessity for the first respondent to agree to this provision if the appellant had purchased the lands on its behalf. This is not a case where a purchaser paid the purchase price in instalment. No prudent businessmen who had paid the full purchase price of the lands would agree to the conditions as set out in cl 10.

[245] How do you resolve the dichotomy when the terms in the recital of the agreement are ambiguous or in direct conflict with the terms and conditions in the agreement itself? Lord Esher in *Ex Parte Dawes, In re Moon* (1886) 17 QBD 175 answered it as follows:

> If the recitals are clear and the operative parts is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the the recitals and the operative part are clear, but they are inconsistent with each other, its operative part is to be preserved.

[246] In *Federal Flour Mills Bhd v Fima Palmbulk Services Sdn Bhd and another appeal* [2005] 6 MLJ 525, the Court of Appeal approved what Sir John Romilly Master of the Rolls in *Re Strand Music Hall Co (Ltd)* (1865) 35 Beav 152 at p 856 said:

> The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed unless it be impossible to reconcile it with another and more express clause in the same deed. I think I must, if possible, give effect to both these clauses in the articles in question ….

[247] Here we have a situation where the recitals are in direct conflict with the terms and conditions of the agreement itself. I find that the terms and conditions of the agreement are clear and not inconsistent with one another. They regulate the relationships between the contracting parties, including their respective rights and obligations. As such the court must construe the agreement according to the terms and conditions agreed by the parties. The expressed intention of the parties is very clear. Clause 10 of the agreement says

that the appellant shall not sell, charge or encumber his lands during the duration of the proprietary mining licences. He has even agreed to deposit the titles of the said lands with the first respondent as security for such undertaking.

[248] What is the position of the parties after the expiry of the proprietary mining licences? The answer can be found in cl 16 of the agreement. Clause 16 states that the first respondent's right to hold on the lands is only 'for as long as there are ores to be won from the lands'. That was the very reason why the consideration in the memorandum of transfer executed between the appellant and the first respondent was stated as 'AGREEMENT DATED 8TH DAY OF MARCH 1952'. In short, the transfer was made on the basis of the agreement itself. This means that the transfer was on the terms and conditions contained in the agreement. It was certainly not for a cash consideration. Thus, the lands, by necessary implications, should revert to the appellant upon the expiry of the mining licences. In my view, the first respondent has no contractual right to hold on the lands indefinitely, let alone to sell the lands to the second respondent.

[249] The intention of the parties is reflected in the so called irrevocable power of attorney ('the PA') made on the same day. The second recital to the PA states:

> And whereas under an agreement dated the 8th day of March 1952 and made between me of the one part and Ramunia Bauxite Limited of No. 66 High Street, Singapore of the other part it was inter alia agreed that for the better securing to the said Ramunia Bauxite Limited the proper carrying and conduct of the mining work on the said lands and other lands and or other lands under the Proprietary Mining licences and Mining Leases which may be issued to me I should give to Ramunia Bauxite Limited an irrevocable Power of Attorney.

[250] The dominant, if not the sole purpose of the agreement, is to facilitate the mining operations which was to be carried out by the first respondent.

[251] Clause 1 of the PA gives the first respondent the right to enter upon and take possession of the said lands which the appellant 'may now own or in the future own' to enable it to prospect and mine for bauxite and aluminium ores or any other ores at the first respondent's own expense.

[252] Clause 7 of the PA empowers the first respondent to apply to the Government of Johore for the issue of proprietary mining licences over the said lands or any other lands which the appellant may acquire in the future, in his own name. The words used are 'over the said lands or any other lands... which I may in future acquire in my name....' The PA does not state anywhere that the lands were bought by the appellant on behalf of the first respondent.

[253] Clause 14 of the PA, which is the concluding clause, emphatically states:

> And the above powers being given for valuable consideration I hereby declare that such powers are irrevocable from the date hereto and *for the terms of the said Proprietary Mining licences* and or Mining Leases as shall or may be issued to me in respect of the said lands and other lands in Telok Ramunia in the Mukim 8 Pantai Timor in the District of Kota Tinggi and for the terms for which such Proprietary Mining licences may from time to time be renewed and for the terms of the Mining Leases or Leases for which such Proprietary Mining licences may be exchanged. (Emphasis added.)

[254] The power of attorney does not confer unfettered right on the first respondent to deal with the lands in whatsover manner it likes or to sell the said lands to any third party. It also does not confer any right to the first respondent to hold on to the lands indefinitely. The PA is only for a limited period, that is for the duration of the proprietary mining licences. It is not in fact an irrevocable power of attorney. It is a power of attorney irrevocable for the duration of the proprietary mining licences and as long as there are ores to be won from the lands.

[255] The learned judge held the view that where land is transferred under the National Land Code the transferee assumes a legal proprietorship over it and is not bound to retransfer it back to the transferor unless there is a binding contract which obliged him to do so. He rephrased the issues for the court's determination by posing the question: Was there such an agreement to retransfer? He held that there was no such evidence. With utmost respect, this is where the court erred. In the first place, the second agreement, which is a binding contract between the parties, is not a sale and purchase agreement. This is clear from the terms and conditions of the second agreement. It is implicit in the terms and conditions of the agreement that the lands should properly and legally belong to the appellant after the expiry of the proprietary mining licences.

[256] Next, I come to the salient facts of the case. The respondents relied heavily on the letter dated 14 February 1952 from the appellant to the first respondent to show that the appellant purchased the said lands on behalf of the first respondent. This letter reads:

The Managing Director

Ramunia Bauxite Ltd

Singapore

Re: Land bought in Telok Ramunia by Messrs Ramunia Bauxite Ltd., in the name of Abdul Kadir bin Ami for the purpose of mining Bauxite under an Agreement between Abdul Kadir bin Ami and other Directors of Ramunia Bauxite Ltd., dated 10.3.51 comprising of Lots 170, 168, 164, 128, 169, 167, 157, 161, 158, 162, 163, 144, 156, 140, 141, 148, 155, 143, 55, 150, 39, 149, 145, 154, 152, 136, 153, 139, 142, 141, 165, 135, L.O. 33, 134, 138, A.O. 385, 151, 172, 171, 166, 137

I, Abdul Kadir bin Ami, a Director of Ramunia Bauxite Ltd., having purchased and registered in my own name certain bauxite bearing lands situated on Bukit Bopeng and Bukit Wakab Besar in Telok Ramunia comprising of lots as mentioned above, do hereby declare that these purchases have been made on behalf of the Company with the Company's funds, and are the properties of the Company (Ramunia Bauxite Ltd.).

I further accept the fact that these lands have been acquired for the express purpose of bauxite mining under the terms of an Agreement made between me and my fellow Directors, Messrs. Tow Keng Hee, Wong Shee Fun, Tow Siang Ling and Ng Yook Lin, dated 10.3.51, whereby it is clearly stated that I shall be entitled a tribute of $2.00 per ton of bauxite mined and exported from this area. I also acknowledge that any tribute payable to the former landowners shall be my own responsibility and shall come from the said tribute of $2.00 per ton paid to me.

I hereby also acknowledge that it is my duty and responsibility for the E.M.R.s are registered in my name and not in the name of the Co. to make applications for P.M.L.s in my own name on behalf of Ramunia Bauxite for renewals of such P,M. L.s when they expire.

It is also my intention to give to the Company (Ramunia Bauxite Ltd.) an irrevocable power of attorney to exploit and work these lands and to make all application for P.M.L.s or mining licences in respect of the above mentioned lands, and any other future acquisitions of bauxite bearing lands.

Sgd.

Abdul Kadir bin Ami

Director — Ramunia Bauxite Ltd.

[257] The appellant did not deny writing the letter but explained in his affidavit affirmed on 26 January 1986 that he could not recall what he said therein. He further explained that the agreement dated 10 March 1951 referred to in the caption of the letter was in respect of other lots and not the lots as stated in the letter itself. I find that it is true that the agreement dated 10 March 1951 is not related to the lots as stated in the said letter.

[258] It must be noted that this letter was written by the appellant to the first respondent in his capacity as a director of the first respondent. It was written *before* the date of the second agreement. As such this letter was overtaken by subsequent event. It was superceded by the second agreement and should not be relied upon as an aid to construe the second agreement. The learned trial judge therefore erred when he held that this letter corroborated the preambles in the second agreement.

[259] It was contended on behalf of the respondents that this was an opportunistic claim by the appellant as he started off by claiming 49 lots of land (eight lots in the first agreement and 41 lots in the second agreement) and subsequently confined himself to only 29 lots of land when he could not prove the whole of his claims. It was also alleged that he had never disclosed the other 41 lots to the official assignee and to his creditors after being adjudicated as a bankrupt. The short answer is this. The appellant had already transferred the 41 lots of land pursuant to the second agreement before he was made a bankrupt. At the material times the proprietary mining licences had not expired. If at all there was any need to disclose it, it should have been made by the first respondent who was in possession of the proprietary mining licences and holding the titles to the 41 lots of lands as security.

[260] It is a fact that the appellant was the original holder of the proprietary mining licences. He obtained these licences on his own right before he executed the first agreement. Section 43 of the Johor Mining Enactment states that mining licences can only be granted to the proprietor of the land. That explained the reason why the appellant had to purchase lands from their previous owners in order to get the proprietary mining licences. There is evidence that he bought some of the lands from his own money and partly from a loan of RM10,000 from individuals as demonstrated by the agreement dated 9 May 1951. The appellant did not at any time make the application for proprietary mining licences on behalf of the miners.

[261] The four promoters of the first respondent, who called themselves as miners did not have any proprietary mining licences when they signed both agreements with the appellant. Neither did they apply for the said licences in their own names. They could not do so as they were not owners of the lands. But they were shrewd businessman. They saw the opportunities. So, they

proposed the formation of the first respondent company to the appellant in order to prospect and mine bauxite ores and aluminium ores or any other ores under licences granted to the appellant and made him a director of the first respondent. In return, the appellant agreed to allow the first respondent to enter into possession of the eight lots of lands under the first agreement and later another 41 lots of lands pursuant to the second agreement for mining purposes. Under the second agreement the appellant was also promised a tribute of two dollars ($2) for every ton of bauxite or aluminium ores won and extracted from the said lands. But the first respondent made sure that it was the appellant's responsibility to pay any tribute to the former landowners. There was never any intention to sell the lands outright to the first respondent. The miners also had never expressed any intention to purchase the lands.

[262] The minutes of meeting at the district office on 14 December 1952 attended by one of the promoters, namely Toh Siang Ling and the deceased together with twenty two landowners provide some historical insight on the intention of the parties and the circumstances under which the lands changed ownership. It was at this meeting that the collector of land revenue posed the question of the future ownership of the mining lands upon completion of mining operations. Mr Contrad said that if the former owners expressed a desire for the return of their lands the necessary transfers would be executed. To me, that was a clear intention that right from the outset the miners or the first respondent had no hidden intention to own the said lands. As at the date of the meeting the deceased was already a director of the first respondent.

[263] The consideration for the subsequent transfers of the lands on diverse dates by the appellant to the first respondent was stated as the agreement dated 8 March 1952. Hence, the transfers must be subject to the terms and conditions in the second agreement. It was a term of the second agreement that the first respondent had the right to enter into and take possession of the said lands for mining operations during the duration of the proprietary mining licences and so long as there were ores to be won from the said lands.

[264] After going through all the contemporaneous documents and after having heard the parties, I find that these documents tend to support the appellant's contention that under the terms and conditions of the second agreement he merely allowed the first respondent to enter into possession of the 41 lots of lands in the Schedule, including the 29 lots he is now claiming, for purposes of mining during the terms of the proprietary mining licences in consideration of $18,725 paid to him; and that the appellant had no intention to transfer the said lots to the first respondent permanently and unconditionally. These contemporaneous documents do not support the first respondent's contention that the appellant purchased the lots in the Schedule

of the second agreement in appellant's name for and behalf of the first respondent out of various sums of money totaling $18,725 advanced by the first respondent to the appellant.

[265] I have also considered whether there is any evidence to contradict the appellant's claim for retransfer of the 29 lots of land to him. Out of these 29 lots of land, I find that there is affirmative evidence that three lots, namely Lot 140, held under EMR 115, Lot 155 held under EMR 43 and Lot 149 held under EMR 23 were clearly bought by the appellant for and on behalf of the first respondent by way of three separate sale and purchase agreements.

[266] These three agreements can be found in pp 617, 619 and 624, Vol 5 of the appeal record. Unlike cl 1 of the second agreement, cl 1 of each of these three agreements clearly states that the vendor sells and transfers all the right, title and interest in the said lands in favour of the purchaser free from all charges and incumbrances in consideration of a fixed sum of money as stated in the said clause.

[267] It therefore follows that the appellant is only entitled to claim back the other 26 lots of land as listed in the Schedule of the second agreement. The contemporaneous documents, such as the first agreement, the power of attorney, the relevant land titles evidencing the various transfers from the previous owners to the appellant, the minutes of meeting dated 14 December 1952, and the appellant's own affidavit, fortify the appellant's contention that the first respondent was only allowed to enter into possession of these lots for the purpose of mining during the duration of the proprietary mining licences in consideration of $18,725 paid to him.

[268] The first respondent had therefore fraudulently held the 26 lots of land contrary to the terms and conditions of the second agreement by refusing to retransfer them back to the appellant. The first respondent had no right to sell and transfer them to the second respondent. The first respondent tried to pursuade its former managing director, Tow Siang Ling, who was also one of the miners who signed the first agreement, to testify in court to explain the land transactions between the appellant and the first respondent. The relevant extract of the first respondent's letter to him reads: 'As the present Directors are not aware of these purported transactions and since you are the only person who would be able to throw some light on the dealings of the company during that time, the Directors would appreciate it if you could provide whatever assistance as and when you are required to do so by our solicitors in the defence of this action.' He did not come forward to testify.

[269] The second respondent, being the subsequent purchaser of the these 26 lots of land cannot acquire a valid and indefeasible title under s 340 of the National Land Code when the transferor's title to the said lots was itself acquired by fraud unless it can be shown that it had bought the lands as a bona fide purchaser for value. The second respondent did not however plead as a defence that it bought the lands as a bona fide purchaser for valuable consideration.

[270] There was ample evidence to show that the second respondent knew directly or by inference of the existence of the second agreement. In 1981, when the first respondent sold its shares to the second respondent and later in 1983 when it sold the lands to the second respondent, Brian Chang was a common director to both respondents. The minutes of directors' meeting of the first respondent on 13 May 1982 which approved the sale of the lands to the second respondent showed that Brian Chang was a director of the first respondent. He was also a director of the second respondent. The search made at the Registry of Business and Companies, Singapore on 11 June 1985 showed that Brian Chang was appointed as a director of the first respondent on 24 October 1981. He was an agent of the second respondent since 10 November 1980. So when the second respondent passed its directors' resolution on 23 May 1983 to purchase the lots as stated therein, which included the 29 lots claimed by the appellant, the second respondent must be deemed to have known of the terms and conditions of the second agreement (p 823, Vol 6, appeal record). Brian Chang was a director of the second respondent and a signatory to the said resolution. The second respondent cannot therefore claim that it was a bona fide purchaser for value without notice.

LIMITATION

[271] Limitation, although pleaded as a defence, was not seriously pursued at the trial. Learned counsel for the respondent only made a brief submission on this point. Yusof J, in dismissing the respondents application to strike out the appellant's action held that limitation did not apply as the appellant was under a disability whilst he was a bankrupt and for the purpose of limitation the time only began to run from 1983. The action was filed in 1985.

[272] The learned trial judge did not dismiss the appellant's claim on the ground of limitation. In fact, it was never referred to in his judgment. Before us, the issue of limitation was not fully argued. In para 5.5 of his written submission learned counsel for the respondents merely stated: 'If called upon

the defendants are prepared to address the court on the issue of estoppels, indefeasibility, limitation and or acquiescence/laches'. This is in fact an exact reproduction of his written submission before the trial judge (p 24, Vol 2, appeal record).

[273] In my view the claim is not statute barred by virtue of s 24(1) of the Limitation Act 1953 which reads:

> If on the date when any right of action accured for which a period of limitation is prescribed by this Act, the person to whom it accured was under a disability, the action may be brought at any time before the expiration of six years … from the date when such person ceased to be under a disability … notwithstanding that the period of limitation had expired.

[274] The appellant ceased to be under a disability only in 1983. He was only discharged as a bankrupt on 12 January 1983. When he filed this action in 1985, limitation had not set in.

[275] In my view, s 2(2) of the Limitation Act is not a definition of the word 'disability'. It merely states that 'For the purposes of this Act, a person shall be deemed to be under a disability while he is an infant or of unsound mind'. This is just a presumption. The deceased appellant was neither an infant nor a person of unsound mind. He was not caught by s 2(2). His disability was due to his bankruptcy and 'disabled' by law, namely s 38(1)(a) of the Bankruptcy Act 1967 to maintain any action whilst being an undischarged bankrupt without the previous sanction of the then official assignee.

[276] For the aforesaid reasons, I allow the appellant's appeal and order that:

(a) the first respondent do sign execute seal and deliver to the appellant and/or his nominees duly perfected instruments of transfer of all the 26 lots of land together with the documents of title thereto; and

(b) the first and second respondents do deliver up the agreements of sale or other instruments relating to the intended sale of the 26 lots of lands for cancellation.

[277] I have read the judgment in draft of my learned brother Abdul Malik bin Ishak JCA and agree with him that the appeal be allowed on the aforesaid terms with costs of RM100,000 here and below to the appelant.

Appeal allowed with costs.

Reported by Kohila Nesan